

Supreme Court, U.S.
FILED

MAY 31 1978

MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1105

ANTHONY HERBERT,

Petitioner,

against

BARRY LANDO, MIKE WALLACE, COLUMBIA
BROADCASTING SYSTEM, INC., ATLANTIC
MONTHLY COMPANY,

Defendants,

BARRY LANDO, MIKE WALLACE and CBS Inc.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT.

Petition for Certiorari Filed February 6, 1978.
Certiorari Granted March 20, 1978.

Index to Appendix.

	Page
Relevant Docket Entries	1a
Complaint	8a
Exhibit A, Annexed to Complaint	40a
Exhibit B, Annexed to Complaint	63a
Answer of Mike Wallace and Columbia Broadcasting System	89a
Answer of Barry Lando	94a
Amended Answer of Defendant Lando	109a
Letter, Dated June 22, 1976, From Plaintiff's Coun- sel to Counsel for Wallace and CBS	125a
Letter, Dated June 22, 1976, From Plaintiff's Coun- sel to Counsel for Defendant Lando	130a
Letter, Dated July 1, 1976, From Counsel for De- fendants Wallace and CBS to Plaintiff's Coun- sel	136a
Letter, Dated July 1, 1976, From Counsel for De- fendant Lando to Plaintiff's Counsel	146a
Letter, Dated July 16, 1976, From Plaintiff's Counsel to Counsel for Defendant Lando	150a
Letter, Dated July 19, 1976, From Plaintiff's Coun- sel to Counsel for Defendants Wallace and CBS	152a

Transcript of Proceedings Before Hon. Charles S. Haight, Jr., Dated July 21, 1976	157a
Letter, Dated July 22, 1976, From Plaintiff's Coun- sel to Counsel for All Defendants	182a
Affidavit in Support of Plaintiff's Motion to Compel Discovery	184a
Opinions and Orders of Courts Below—Printed in Appendix to the Petition for Writ of Certio- rari	194a

Supreme Court of the United States

ANTHONY HERBERT

vs.

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING
SYSTEM, Inc., ATLANTIC MONTHLY COMPANY.

Relevant Docket Entries

Attorneys for plaintiff:

Cohn, Glickstein, Lurie, Ostrin & Lubell, 1370 Avenue
of the Americas, N.Y.C. 10019, 757-4000.

Attorneys for defendant:

Coudert Brothers, Pan American Bldg.—200 Park Ave
—NYC 10017 (973-3300) (for defts. Mike Wallace and
CBS).

Rembar Wolf & Curtis, 19 West 44th St—NYC 10036
(575-8500) (for deft. Atlantic Monthly Co.).

Green & Hillman, 1270 Ave. of the Americas—NYC
10020 (246-8689) (for deft. Barry Lando).

Date	Proceedings
1974	
Jan. 25	Filed Complaint. Issued Summons.
Jan. 25	Filed order that Edith Williams is appointed to serve the summons and complaint on the defts. Mike Wallace, Columbia Broadcast- ing System, Inc. and Atlantic Monthly Com- pany and that Luther C. West is appointed to serve the summons and complaint on the deft. Barry Lando. Clerk

Relevant Docket Entries

Date	Proceedings
Jan. 25	Filed order that Gabriel Kantrovitz is appointed to serve summons and complaint on the deft. Atlantic Monthly Company. Clerk
Feb. 1	Filed affdvt. of service of Edith Williams of summons and complaint to deft. Atlantic Monthly Co.
Feb. 1	Filed affdvt. of service of Edith Williams of summons and complaint to deft. Mike Wallace.
Feb. 1	Filed affdvt. of service of Edith Williams of summons and complaint to deft. Columbia Broadcasting System, Inc.
Feb. 4	Filed summons with return: SERVED: Affidavit of Luther C. West dated Jan 31, 1971
Feb. 15	Filed Order extending defts' time to answer to 3-15-74. FRANKEL, J. (m/n)
Feb. 15	Filed defts. Columbia Broadcasting System, Inc.'s and Mike Wallace's <i>ex parte</i> motion to enlarge time.
Feb. 19	Filed stip & order extending deft. Atlantic Monthly Co.'s time to answer to 3-15-74.
Feb. 19	Filed memo endorsed on motion filed 2-15-74. Motion granted. So ordered—FRANKEL, J. (m/n)
Feb. 19	Filed summons upon Barry Lando by Clerk of the U.S.D.C. that an answer to said complaint be served upon Cohn Glickstein Lurie Ostrin & Lubell with attached affidavit of service by Luther C. West dated 2-12-74.
Feb. 25	Filed stip & order extending deft. Barry Lando's time to answer to 3-15-74. So ordered—FRANKEL, J.

Relevant Docket Entries

Date	Proceedings
Mar. 18	Filed defts'. Barry Lando, Mike Wallace and Columbia Broadcasting System, Inc's affdvt. of Barry Lando and notice of motion for an order severing counts 1 and 11 of complaint. Ret. 3-25-74
Mar. 18	Filed defts' Barry Lando, Mike Wallace and Columbia Broadcasting System, Inc's memorandum of law in support of their motion to sever; and in the alternative to compel separate trials of Counts 1 and 11 of pltff's complaint.
Mar. 18	Filed ANSWER of defts. Mike Wallace and Columbia Broadcasting System, Inc.
Mar. 18	Filed ANSWER of deft. Barry Lando
Mar. 19	Filed ANSWER of deft. Atlantic Monthly Co.
Mar. 25	Filed deft. Atlantic Monthly Co's memorandum in opposition to motion by defts. Lando, Wallace and CBS insofar as it seeks a severance of counts 1 and 11 of the complaint and in support of their motion as it seeks, in the alternative, separate trials of counts 1 and 11.
Apr. 2	Filed amended ANSWER of deft. Barry Lando
Apr. 4	Filed defts. Barry Lando, Mike Wallace and CBS, INC. memorandum of law in further support of their motion to sever; and in the alternative to compel separate trials of counts 1 and 11 of pltff's complaint.
Apr. 5	Filed pltff's memorandum in opposition to motion of defts. Lando, Wallace, CBS, INC. to sever or for separate trials.
Apr. 5	Filed deft. Atlantic Monthly Co's further memorandum in support of the motion for separate trials.

4a*Relevant Docket Entries*

Date	Proceedings
May 9	Filed memo endorsed on motion filed 3-18-74. Motion denied. So ordered—FRANKEL, J. (m/n)
May 15	Filed pltff's first request for production of documents.
May 15	Filed pltff's notice to take deposition of deft. Barry Lando on 6-19-74
May 16	Filed pltff's notice of taking deposition of deft. Mike Wallace on 6-25-74
May 20	Filed pltffs Notice to take deposition and first request of pltff for production of documents.
June 26	Filed deft. Atlantic Monthly Co's answer to first request for production of documents.
June 26	Filed deft. Atlantic Monthly Co's first request for production of documents.
July 5	Filed stip & order extending deft. Atlantic Monthly Co's time to respond to first request for production of documents to 6-21-74 and the time for all other defts. to respond to the first request for production of documents is extended to 7-11-74 and as indicated. So ordered—FRANKEL, J.
July 12	Filed defts. Mike Wallace and Columbia Broad- casting System, Inc's answer to first request for production of documents.
1975	
Aug. 1	Filed pltff's notice of taking deposition of the U.S. Dept. of Army, Office of Information, on 8-18-75
Aug. 6	Filed Affdvt. of service of subpoena <i>duces tecum</i> by an individual—served: U.S. Dept. of the Army, Office of Information by Col. Leo T. McMahon, Jr. on 8-4-75

5a*Relevant Docket Entries*

Date	Proceedings
1976	
Jan. 8	Filed notice of change of firm name of defts atty, to Green & Hillman.
Feb. 23	Filed pltffs second request for production of documents.
Mar. 24	Filed pltffs answer to Atlantic Monthly Co's first request for production of documents.
Apr. 5	Filed defts (Lando's) answer to second request of pltff for production of documents.
Apr. 5	Filed deft (Lando's) answer to first request of pltff for production of documents.
1977	
Apr. 26	Mailed notice of reassignment to Judge Haight
1976	
Apr. 23	Filed Defts'. (Mike Wallace & CBS) first re- quest for production of documents.
May 12	Filed Deft's. (Barry Lando) first request for production of documents.
May 13	Filed Deft's. (Barry Lando) notice of designation of Richard G. Green as trial counsel.
May 17	Filed Defts'. (Mike Wallace & CBS, Inc.) notice of designation of Carleton D. Eldridge, Jr. as trial counsel.
May 17	Filed Pltff's. notice of designation of Jonathan W. Lubell and Mary K. O'Melveny as trial counsel.
May 18	Filed Deft's. (Atlantic Monthly Co.) notice of designation of Charles Rembar as trial coun- sel.

Relevant Docket Entries

Date	Proceedings
May 24	Filed Defts'. (Mike Wallace & CBS) answers to questions by the court.
May 24	Filed Deft's. (Lando) answers to questions by the court.
May 25	Filed Pltff's. answers to questionnaire for initial pre-trial conference.
May 26	PRE-TRIAL CONFERENCE HELD BY Haight, J.—Rule 37 motion to be made. Motion for summary judgment to be submitted & discovery to be completed by 1-1-77.
June 2	Filed Pre-Trial Order that discovery shall be completed by 10-29-76 and that Defts' summary judgment motions shall be submitted by 12-31-76 Haight, J. (mailed notice)
June 10	Filed Pltff's. response to Defts'. (Wallace & CBS) first request for production of documents.
June 10	Filed Pltff's. response to Deft's. (Lando) first request for production of documents.
July 21	Hearing begun and concluded July 21, 1976 on the matters of discovery. (before CSH)
Aug. 31	Filed transcript of record of proceedings dated 7-21-76.
Sept. 23	Filed Pltff's affidavit in support of motion to compel discovery.
Sept. 23	Filed Deft's. (Atlantic) affidavit in opposition to Pltff's. request for additional discovery.
Sept. 23	Filed Deft's. (Atlantic) memorandum in opposition to Pltff's. requests for further discovery.
Sept. 23	Filed Defts'. (Lando, Wallace & CBS) memorandum of law in opposition to Pltff's. Rule 37 application.

Relevant Docket Entries

Date	Proceedings
Sept. 23	Filed Pltff's. memorandum of law in support of motion to compel discovery.
Oct. 29	Filed pltffs reply brief.
Oct. 29	Filed pltff affidavit in support of motion to compel discovery.
Oct. 29	Filed deft reply memo in opposition to motion.
Nov. 1	Filed Deft reply memo in opposition to pltff's request for further discovery.
Nov. 1	Filed defts affidavit in opposition to pltff's request for discovery.

1977

Jan. 4	Filed Opinion #45494 Defts are ordered to comply with memo opinion of the Judge. All documents demanded by pltff that are not covered by client-attorney privilege are to be produced for in camera inspection of J. Haight.—So ordered Haight J. m/n
Jan. 5	Filed defts' reply memo in opposition to pltffs request for further discovery.
Feb. 24	Filed memo opinion and order #45629 I grant the requested certification and amend the order of 1-4-77 accordingly so as to provide that in opinion ^* the Court such order involves a contr. question of law as to which there is sub. ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation So ordered Haight, J. m/n
Mar. 25	Filed bond for undertaking of costs on appeal in amt. of \$250.00 (Fireman's Fund)
Apr. 15	Filed notice of termination of record on appeal to USCA

Complaint

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

ANTHONY HERBERT,

against

Plaintiff,

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING
SYSTEM, Inc., ATLANTIC MONTHLY COMPANY,
Defendants.

Civil Action No.

PLAINTIFF DEMANDS A TRIAL BY JURY

Plaintiff, by COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL, his attorneys, as and for his complaint against the defendants, alleges as follows:

JURISDICTION AND PARTIES

1. This Court has jurisdiction of the within action under the provisions of 28 U.S.C. 1333(a). The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars.

2. Plaintiff ANTHONY HERBERT (hereinafter "Herbert"), a citizen of the State of Georgia, is a retired United States Army Officer who, prior to his retirement, brought certain charges against his immediate superior officers relative to the cover-up of atrocities during the Vietnam War and subsequent to his retirement caused to be written a book entitled "SOLDIER", which discussed his military career and the events surrounding his charges against said officers.

Complaint

3. Defendant BARRY LANDO (hereinafter "Lando") is, upon information and belief, a citizen of the State of Maryland and at all times hereinafter mentioned is and was an employee of defendant COLUMBIA BROADCASTING SYSTEMS, INC. in which capacity he produced a program entitled "THE SELLING OF ANTHONY HERBERT" (hereinafter "Selling") which was broadcast on CBS Television Network from its studio in New York City on February 4, 1973 and who, subsequent thereto, wrote and caused to be published in the May, 1973 issue of "THE ATLANTIC MONTHLY" magazine published by the defendant ATLANTIC MONTHLY COMPANY an article entitled "THE HERBERT AFFAIR" (hereinafter "Affair").

4. Defendant MIKE WALLACE is, upon information and belief, a citizen of the State of New York, and is and at all times hereinafter mentioned was a reporter employed by the defendant COLUMBIA BROADCASTING SYSTEMS, INC. in which capacity he serves as one of the correspondents of the documentary series known as "60 minutes" and who, as part of that series served as the narrator of and one of the interviewers on "Selling".

5. Upon information and belief, Defendant COLUMBIA BROADCASTING SYSTEM, INC. (hereinafter "CBS") is and at all times hereinafter mentioned was a corporation incorporated under the laws of the State of New York, having its principal place of business in the State of New York and engaging in the business of, among other things, the production, distribution, sale and broadcasting of television programs through one of its divisions, CBS Television Network.

6. Upon information and belief, defendant ATLANTIC MONTHLY COMPANY (hereinafter "Company") is and at all times hereinafter mentioned was a corporation incorporated in the Commonwealth of Massachusetts and

Complaint

engaging in, among other things, the publication, distribution and sale of a magazine known as "THE ATLANTIC MONTHLY" (hereinafter "Monthly") in the State of New York and elsewhere.

FIRST COUNT AGAINST DEFENDANTS BARRY LANDO, MIKE WALLACE AND COLUMBIA BROADCASTING SYSTEM, INC.

7. As a young man of 17, plaintiff enlisted in the United States Army. In the ensuing 24 years of military service he steadily rose in the ranks and was regarded with the highest professional esteem by his fellow soldiers and officers. Plaintiff was repeatedly cited by the Army as the most decorated soldier in the Korean War and in November of 1951, General Matthew B. Ridgeway selected him as the outstanding American soldier in Korea. Plaintiff toured the United States and foreign countries representing the United States Army. Plaintiff's reputation for courage under fire and personal integrity was beyond dispute. In the view of the citizens of plaintiff's country he was a genuine American hero.

8. While Commander of the 2d Battalion, 503d Infantry, 173d Airborne Brigade in Vietnam, plaintiff reported to his superior officers atrocities committed and permitted by United States forces in violation of international law and military regulations. Plaintiff persisted in these reports, criticizing to his superior officers the acts of atrocities which were widely known in the Brigade. Notwithstanding recognition of plaintiff as an outstanding Battalion Commander, he was relieved of command by his superior Brigade officers. A poor efficiency rating was even placed against his record which was subsequently expunged by the Secretary of the Army upon review.

Complaint

9. Immediately following his relief from command, plaintiff attempted to process charges in Vietnam against the Brigade officers—General John W. Barnes (hereafter "Barnes") and Colonel Joseph Ross Franklin (hereafter "Franklin")—for failing to act upon plaintiff's earlier reports and complaints and for covering up the charged atrocities.

10. Upon his return to the United States in 1969, plaintiff continued to pursue, first at Fort Leavenworth and then at Fort McPherson, his charges of war crimes committed in Vietnam during his tour there and the command coverup and complicity. In September of 1970, plaintiff's charges were made to the Third Army Inspector General at Fort McPherson and subsequently referred to the U.S. Army Criminal Investigation Division Agency (USACIDA) and in March of 1971, plaintiff filed formal charges against General Barnes and Colonel Franklin.

11. In or about March of 1971, it became known beyond the military and Department of Defense that plaintiff was charging war crimes and command coverup thereof. Plaintiff's charges and his past difficulties in having the charges filed, investigated or acted upon immediately became a matter of wide public interest.

12. In or about June of 1971, defendant Lando first met plaintiff at Natural Bridge, Virginia. He brought with him an agreement to work on an "as told to" book about plaintiff's military experiences which he asked plaintiff to sign. Plaintiff refused to do so, stating that he believed it was against Army regulations. Lando continued to pursue the matter and approximately two weeks later defendant Lando flew to plaintiff's home where he once again sought to have plaintiff sign such an agreement. Defendant attempted again in March, 1972, immediately following plaintiff's retirement, to have plaintiff sign the agreement. Plaintiff refused again.

Complaint

13. Upon information and belief, commencing at a time which is presently unknown to plaintiff, defendant Lando undertook to create the false picture of plaintiff as a liar who never reported the war crimes he charged, as a perpetrator of atrocities and brutalities himself and as an opportunist who was trying to use an issue of current concern to explain his own alleged failures in the Army. Defendant Lando sought to promulgate this false view of plaintiff through the mass media including the 60 Minutes documentary show, of which he was a producer, and various magazine articles which he would write or cause to be written; notwithstanding the fact that defendant Lando knew that such a portrayal of plaintiff was false. Defendant Lando undertook the said course of conduct maliciously, with the intent to damage plaintiff and, in order to accomplish such objective, used the facilities and influence of the Department of Defense and the Department of the Army. Defendant Lando used and/or worked with other law-enforcement agencies and intelligence agencies to construct the false and defamatory picture of plaintiff to be promulgated through the mass media.

14. Upon information and belief, defendant Wallace participated in the production and presentation and encouraged the publication of "Selling" when he knew that the publication and presentation thereof was false and distorted as herein alleged; that without any basis or investigation defendant Wallace had stated some time prior to "Selling" that plaintiff was a liar whose story should be discredited and defendant sought to carry out this predesign and purpose by his participation in the production of "Selling" while intentionally creating the false impression of a balanced and objective presentation.

15. Upon information and belief, at all times herein alleged and, in particular at the time of the production, presentation and broadcast of "Selling" defendants Lando

Complaint

and Wallace were employees of defendant CBS and their activities and conduct herein alleged were done within the scope of said employment; that said activities and conduct were known to and ratified by certain CBS officials and executive personnel.

16. The television program "Selling", produced by defendant Lando, was broadcast by defendant CBS on February 4, 1973 to millions of viewers; from beginning to end and as a whole it was written, edited and produced to impugn plaintiff's reputation as a hero and an honest man disillusioned with the conduct of the government and the Army he had served with pride, and to falsely and maliciously paint him as a liar, an opportunist and the perpetrator of a hoax upon the public.

17. Under defendant Lando's supervision and direction, with the participation of defendants CBS and Wallace, "Selling" was written, edited and presented to the public under the false guise of "objective reporting" so as to more effectively damage plaintiff's reputation, undermine his charges and remove him as a highly respected critic of the conduct of the military establishment.

18. The transcript of "Selling" as published on national television is annexed hereto as Exhibit "A", made a part hereof and incorporated herein as though fully set forth herein. Defendants composed and caused to publish and did publish said false, malicious and defamatory transcript (Exhibit A) of and concerning plaintiff and by such composition and publication, as well as the presentation and broadcast thereof as herein alleged, defendants meant and intended to convey and did convey the following false and defamatory meanings of and concerning plaintiff:

(a) That plaintiff was not a hero but a cold blooded killer and this was the view of his Commanders and those who served under him.

Complaint

(b) That plaintiff's charges of atrocities, command complicity and cover-up had never been raised until the headlines were filled with news of the My Lai massacres and that plaintiff improperly sought to capitalize on such headlines.

(c) That plaintiff's charges of atrocities, command complicity and cover-up were made out of vindictive motives in response to his relief from command.

(d) That no proof existed to support the plaintiff's charge that he had reported an incident described as the "St. Valentine's Day Massacre" (hereafter "Massacre") to Franklin, his immediate superior, and that plaintiff had lied regarding that event.

(e) That "scores of people" were interviewed about plaintiff's charges, none of whom could support plaintiff, and that plaintiff was therefore a liar.

(f) That plaintiff himself had observed but failed to act on incidents of torture or other atrocities and that plaintiff was therefore a liar.

(g) That "scores of people" were interviewed about plaintiff's book "SOLDIER", all of whom questioned its and plaintiff's veracity and accuracy and that plaintiff had therefore lied in said book.

(h) That no pressure to discredit plaintiff was exerted upon members of the military interviewed for "Selling" and that their statements, therefore, showed plaintiff to be a liar.

(i) That investigations of plaintiff's commanding officers Barnes and Franklin were thoroughly conducted by the military and were not whitewashed in any fashion and that plaintiff's charges against these officers had been proven false.

Complaint

(j) That no proof existed to support plaintiff's charges of atrocities, command complicity and coverup, and that plaintiff therefore had lied on these matters.

(k) That plaintiff himself had participated in acts of brutality.

19. Upon information and belief, defendant Lando's research, interviews and investigation, and that of persons working with him or under his supervision disclosed specific support for and proof of plaintiff's charges of atrocities, command complicity and cover-up as described and discussed by plaintiff prior to the broadcasting of "Selling", and that such support and proof was known to defendants Wallace and CBS.

20. Upon information and belief, defendant Lando enlisted and received the aid, support and assistance of U.S. Army personnel to discredit plaintiff and undermine his story and impact upon the American public. With such assistance defendant Lando elicited equivocal statements from persons still in the Army regarding plaintiff by intimidating them and threatening their military careers. Such assistance and intimidation were known to and countenanced by defendants Wallace and CBS.

21. Upon information and belief, defendant Lando approached various persons to be interviewed with uncorrected galley proofs of isolated segments of plaintiff's book "SOLDIER" or read to them such alleged segments to elicit disagreement or concern with such segments, knowing such persons had not read plaintiff's book in its entirety. Statements and comments made by such persons in response to this technique were thereafter related and represented by defendants on "Selling" to be an indictment of plaintiff's book in its entirety, despite the fact that the full context had not been shown to them. Upon information and belief, had such persons been aware of the full passages or accurate contents of "SOLDIER", they

Complaint

would have made different statements or expressed different reactions. Such conduct was known to and countenanced by defendants Wallace and CBS.

22. Upon information and belief, defendant Lando, taped or caused to be taped film interviews with witnesses and others which were not presented fully on "Selling" but were edited and taken out of the context of the interview so as to support defendants' malicious intentions to discredit plaintiff. Had such interviews been presented in full, or had segments thereof been presented in their proper context, plaintiff would not have been falsely and maliciously portrayed in the manner set forth in paragraph 18 above. Such editorial distortions were known to and countenanced by defendants Wallace and CBS.

23. Upon information and belief, defendant Lando interviewed or caused to be interviewed witnesses who were favorable to and supportive of plaintiff's charges and declined and deliberately failed to include said interviews on "Selling" or to reveal their existence to the television audience. Such intentional omissions of positive information were known to and countenanced by defendants Wallace and CBS.

24. Upon information and belief, defendant Lando conducted or caused to be conducted an interview with Captain Richard Heintz, plaintiff's military lawyer, which supported plaintiff's charges of atrocities, command complicity and cover-up and of the whitewashed investigation of plaintiff's charges against Barnes and Franklin. Defendant Lando failed to include portions of said interview on "Selling" and instead permitted a summary of the interview with Captain Heintz to be presented in a manner which did not reflect its true content, leaving the false impression that Captain Heintz was also uncertain about plaintiff's veracity. Such omissions and actions were known to and countenanced by defendants Wallace and CBS.

Complaint

25. Upon information and belief, "Selling" was presented for approximately 30 minutes of air time and was edited, written and produced in such a manner as to appear to be a contemporaneous and/or continuous interview between plaintiff and defendant Wallace when in fact defendant Lando and defendant Wallace and others interviewed plaintiff in New York for approximately two hours and without the presence of any other persons who appeared on "Selling" except for one brief period lasting approximately 10 minutes with Major James Grimshaw. Defendant CBS was aware of such production, editing and conduct of defendants Lando and Wallace.

26. Upon information and belief, defendants conducted and/or caused to be conducted said interview with plaintiff under conditions which constituted a vast departure from those normally existing for other guests and subjects of "60 minutes" and of other interview, documentary or news programs of defendant CBS or its division CBS News, or of any other network. These unusual and abnormal conditions were intended by defendants and those acting with them to cause plaintiff to appear on "Selling" as evasive, harassed, unresponsive to the interviewers' questions so as to damage his reputation and impugn his credibility with the American public. Some of these unusual conditions included the following:

(a) Plaintiff's interview was conducted and filmed in a small, stark room, painted entirely in white, without decoration, causing abnormal glare and giving plaintiff a haggard and uncomfortable demeanor.

(b) Excessive, high intensity lighting was placed in said room positioned so close to plaintiff's face and eyes as to cause him great discomfort, forcing plaintiff to squint and to be unable to look directly into the face of the interviewer. Such intense light caused plaintiff to appear evasive and not forthright and candid in manner.

Complaint

(c) At least ten or twelve uninformed guards employed by defendant CBS were present in or around said room, positioned at all times in a manner which created an atmosphere of intimidation, uncertainty and harassment.

(d) Defendant Lando, along with defendant Wallace and others used abusive, abrasive and antagonistic language during the course of said interview in an attempt to goad plaintiff to anger. Such language ridiculed and harassed plaintiff and persons attending said interview with him. Such unwarranted hostility and animosity was also expressed by hostile gestures, glances and facial expressions designed to further harass plaintiff and create an aura of uncertainty and defensiveness.

(e) Defendant Lando, at the conclusion of said interview, threatened plaintiff that he intended to "get" him and persons who had worked and were working with him, further adding to the intended atmosphere of harassment, intimidation and uncertainty.

(f) Officials and executive personnel employed by defendant CBS were present at said interview and made no attempt to stop such conduct by defendants Wallace and Lando but rather countenanced and encouraged same thereby causing plaintiff further distress and discomfiture.

27. Upon information and belief, said interview, if viewed in its entirety rather than in the edited and distorted form in which it was published on "Selling" (as set forth in Exhibit "A"), would show the following facts which were at all times known to defendants:

(a) The aforesaid adverse, highly unusual circumstances surrounding said interview including the abrasive and harassing behavior of defendants and others toward plaintiff.

Complaint

(b) That plaintiff's responses to questions aired on "Selling" were not, in fact, the responses given by plaintiff to such questions but were instead taken out of context, with relevant portions deleted or foreshortened, and that the questions to which such answers related were not the same as those which appeared on "Selling".

(c) That had plaintiff's actual responses to the questions aired on "Selling" been shown, they would not have created the impression of vagueness and evasiveness which the alleged answers shown created.

28. Upon information and belief, defendants caused and intended "Selling" as published to include facial expressions, grimaces and vocal emphases designed to cast doubt upon plaintiff's reputation and allegations and instill in the mind of the television audience that plaintiff was not truthfully regarded. Such gestures, tones of voice and related actions cannot be adequately determined from the written transcript of "Selling" annexed as Exhibit "A" and incorporated herein but were unique to the medium of visual presentation.

29. Upon information and belief, the taped, filmed or other interviews made or caused to be made by defendants Lando, CBS, Wallace and others for the production and presentation of "Selling" were conducted in comfortable settings, in direct contrast to the environment of plaintiff's interview as set forth in Paragraph 26 and, if seen or heard in their entirety, would show the following facts, directly in conflict with the false and malicious impressions created by "Selling" as set forth in Exhibit "A".

(a) That an interview of Major Grimshaw was conducted in Pentagon, with Army personnel in attendance.

(b) That the interview with Kenneth Rosenblum would reveal that he was an investigator assigned to the Military District of Washington, the same command in which Barnes

Complaint

was a superior officer, and not merely a disinterested investigator from the Judge Advocate General's Corps.

(c) That the interview with Sargeant Bruce Potter was excerpted on "Selling" to portray plaintiff as a war criminal when Sargeant Potter repeatedly stated that plaintiff did not and would not have condoned or committed war crimes.

(d) That the questions asked of Colonel John Douglas, Barnes and Franklin were specifically designed to elicit responses damaging to plaintiff and that it was made clear to Barnes and Franklin that the intention of "Selling" was to discredit plaintiff and thus to remove him as an effective critic of the military establishment.

(e) That defendants deliberately misrepresented plaintiff's remarks, writing, and statements to certain witnesses in order to goad them into anger at plaintiff so as to elicit the desired distorted responses to questions which cast plaintiff as a liar, an opportunist and a vindictive man.

(f) That defendants deliberately attempted to create the impression in the minds of persons being interviewed that plaintiff had made a fortune from the writing of his book, intending to breed suspicion and contempt for plaintiff so as to elicit distorted responses.

(g) That numerous persons interviewed supported plaintiff's charges, as well as his veracity and leadership, and specifically denied any suggestion that plaintiff was brutal or as a ruthless "killer".

(h) That numerous persons interviewed who were still in the military declined to respond favorably to plaintiff or at all because of fear of reprisals or other adverse influence upon their careers and that in some cases defendants, with the participation and assistance of the U.S. Army, used such fears to exploit and affect their responses.

Complaint

(i) That the summary of the interviews of Mike Plantz and Bob Stemmies presented on "Selling" were distorted and out of context.

(j) That the interviews of Captain Bill Hill would reveal that Hill supported plaintiff's version of reporting the "Massacre" to Franklin and of other charges made by plaintiff, that Hill was fearful of military repercussions for any favorable statements made about plaintiff, that Hill believed that Army regulations prevented him from detailing his knowledge of incidents reported and described by plaintiff, and further that the quote attributed to him on "Selling" was out of context and elicited by deceitful means by misrepresenting to Hill statements made by plaintiff which had not been made.

30. Upon information and belief, defendants Lando, Wallace and CBS selected the title to "Selling" so as not only to impugn the honesty and motives of plaintiff but also to placate the Pentagon after having previously received adverse and hostile reactions from the U.S. Military establishment to a documentary program entitled "The Selling of the Pentagon" which criticized said establishment.

31. The conduct of defendants Lando, Wallace and CBS, at all times herein, as set forth above, deliberately and maliciously defamed plaintiff, was accomplished by means which radically departed from usual and normal professional media and journalistic standards, and resulted in the national broadcast of "Selling" which created and presented false and distorted information and impressions known to defendants to be false and distorted but presented with reckless disregard of whether or not they were false and distorted.

32. The malicious activities of defendants with regard to the intentions and effect of "Selling" have continued to date, in that defendant CBS has attempted to forestall the

Complaint

instant litigation by directing its wholly-owned subsidiary Holt, Rinehart & Winston, publisher of "SOLDIER" not to make an early payment against plaintiff's earned royalties under his contract according to the standard usual custom and practice in the publishing trade, which would have been made but for the intervention of defendant CBS.

33. By reason of the aforesaid acts of defendants Lando, Wallace and CBS, the broadcast of "Selling" caused plaintiff to suffer the following special damages: (a) The appearance of "Selling" almost simultaneously with the publication of "SOLDIER" impaired said book as a literary property and caused sales to be below expectations; (b) the sale of the paperback rights of "SOLDIER" was for a sum substantially less than would have been received had "Selling" not been broadcast; (c) offers and discussions regarding sale of motion picture rights to "SOLDIER" which took place prior to the broadcast of "Selling" were discontinued after its broadcast and no movie rights have been sold; (d) offers and discussions regarding the sale of rights to a filmed lecture series to television, industry and educational institutions which took place prior to the broadcast of "Selling" were discontinued after its broadcast and such rights have not been sold; (e) plaintiff's paid speaking engagements and public appearances dropped sharply immediately after the broadcast of "Selling" and have continued to be far less than prior to such broadcast, all to his special damage in the sum of Two Million Five Hundred Thousand (\$2,500,000) Dollars.

34. By reason of the aforesaid acts of defendants, plaintiff has been grievously injured in his good name, character and reputation; plaintiff's reputation among the American public in general as a courageous and honest person dedicated to the welfare of his country has been seriously impaired; plaintiff's reputation, both to the general public and to his friends, acquaintances and former

Complaint

colleagues in the armed forces, as a professional soldier of high moral character has been destroyed; plaintiff's good name and character acquired over many years of dedicated service to his country has been deeply damaged, and plaintiff and his family have been held up to ridicule and contempt by friends, acquaintances, neighbors and the public in general, all to his general damage in the sum of Ten Million (\$10,000,000.00) Dollars.

SECOND COUNT AGAINST DEFENDANTS BARRY LANDO AND ATLANTIC MONTHLY COMPANY

35. Plaintiff repeats and realleges each and every allegation contained in paragraphs of this Complaint numbered "1" through "3" inclusive, "6" through "13" inclusive and "16" through "31" inclusive, as though herein fully set forth at length.

36. The magazine "Monthly" published by defendant Company is sold throughout the country and, upon information and belief, has a circulation in excess of 375,000 copies.

37. The magazine article "Affair", written by defendant Lando, was distributed by defendant Company in the May, 1973 issue of "Monthly", Volume 231, Number 5; "Affair" was written and published to impugn plaintiff's reputation as a hero and an honest man disillusioned with the conduct of the government and the Army had had served with pride, and to falsely and maliciously paint him as a liar, an opportunist and the perpetrator of a hoax upon the public.

38. By reason of defendant's malicious intentions, the magazine article "Affair" repeated, continued and republished the false and defamatory information broadcast on "Selling" and, upon information and belief, defendant wrote said "Article" intending to accomplish such a result.

Complaint

39. "Affair" was written by defendant Lando and published by defendant Company under the false guise of "objective reporting" so as to effectively damage and continue the damage to plaintiff's reputation, undermine his charges and remove him as a highly respected critic of the conduct of the military establishment.

40. A copy of "Affair" as published in "Monthly" is annexed hereto as Exhibit "B", made a part hereof and incorporated herein as though fully set forth herein. Said "Affair" which defendant Lando composed and defendants caused to be published and did publish is false, malicious and defamatory of and concerning the plaintiff; by such writing and publication as a whole and by the specific passages alleged herein defendants meant and intended to convey and did convey the false and defamatory meanings of and concerning plaintiff alleged herein.

41. "Affair" conveyed the false, defamatory and malicious impression that plaintiff was a brutal and vicious man who had himself committed acts of atrocities and war crimes, by reason of the following specific passages therein, as well as in its entirety:

(a) "Reporters who inquired about the case had interviews arranged for them with several officers who had known Herbert in the 173rd and disputed his charges. Many leveled accusations against Herbert, claiming he himself had treated enemy POW's brutally, had damaged at least one civilian hamlet, and had exaggerated or otherwise misrepresented body counts."

Upon information and belief, defendant Lando maliciously omits the fact, known to him when "Affair" was written and published, that the Secretary of the Army formally exonerated plaintiff from all such charges; that every company officer in plaintiff's Battalion had sworn under oath that body counts reported by plaintiff were

Complaint

accurate; and that the interviews mentioned were arranged by officials of the Army with persons known to be unfavorable to plaintiff or fearful of reprisals by the Army for making favorable statements about plaintiff.

(b) "Many other officers, who might have effectively challenged several of Herbert's charges, kept silent, either because they had respected him in Vietnam, or because they just did not want to tangle with him."

The impression that plaintiff was a man to be feared, thereby causing persons interviewed to be afraid to tell the truth, is false.

(c) "It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes".

The suggestion that plaintiff had committed war crimes himself and wanted to cover up his own conduct is false and defamatory.

(d) "Master Sergeant Roy Baumgartner, who served under Herbert, was charged with having murdered three Vietnamese peasants in cold blood, blown off their heads with a grenade, then produced several Chinese weapons which he claimed he found on their bodies to substantiate his story that they were enemy soldiers. Herbert ridicules the charges, and depicts himself defending a hapless Baumgartner's constitutional rights against badgering military investigators.

Herbert ends his account without mentioning that Baumgartner was ultimately court-martialed and found guilty on the basis of overwhelming evidence."

Complaint

Upon information and belief, defendant Lando knew that Army records reveal that plaintiff himself brought these very charges against Baumgartner and appeared at the court marital (when Franklin and Barnes failed to do so), and defendant Lando further knew that the sentence was changed and reduced by the Army to a nominal fine and Baumgartner returned to Vietnam. Thus the impression that plaintiff condoned war crimes and brutality is false and defamatory.

42. "Affair" conveyed the false and malicious impression that plaintiff had not reported atrocities, including the "Massacre", to his superior officers and that no proof for his charges of such atrocities, command complicity and cover-up existed, and that plaintiff was, therefore, a liar, by reason of the following specific passages thereof, as well as in its entirety:

- (a) "When the Pentagon told Mort Kondracke, the Washington reporter for the Chicago *Sun-Times*, that Franklin had passed a lie detector test denying Herbert had ever reported war crimes to him, Kondracke wrote a lengthy article on the Army's claim. But the New York *Times*, which had given considerable space to earlier news that Herbert had passed a lie detector test, made no mention of the Army's report concerning Franklin."

Upon information and belief, while defendant Lando was aware that the alleged lie detector test taken by Franklin has never been released to the public (nor have its contents, format or testing methods been disclosed) and that the Army refused to permit Franklin and Barnes to be examined by the same expert examiner who had tested plaintiff; the above-quoted statement was written and published to create the false impression that the test had indeed been given and passed as alleged by the Army and that its admission, contents, methods, format and results were comparable to plaintiff's and entitled to the same credibility.

Complaint

(b) By following the passage set forth in (a) above with the republication of a segment of "Selling" depicting portions of an interview between defendant Wallace and Franklin wherein Franklin denied plaintiff's charges, defendant Lando maliciously sought to further emphasize Franklin's false statements that he had never discussed war crimes with plaintiff. Defendant Lando republished said segment notwithstanding the malicious and false manner in which "Selling" was written, edited, produced and broadcast as hereinabove alleged.

(c) "In *Soldier* Herbert claims there are several people who had seen Franklin in Vietnam on February 14. We asked Herbert for names. Not one of those people, in the Army, or out, on the record or off, could back up Herbert's claim."

Upon information and belief, defendant Lando interviewed persons who did support plaintiff's statement that Franklin was present in Vietnam as plaintiff has said, but Lando falsely stated he had not talked to such persons so as to portray plaintiff as a liar.

(d) "Hill denied telling Herbert he was certain he had seen Franklin returning to Vietnam on February 14. He said he had heard Herbert talking about the killings on the battalion radio that day, but did not know who he was talking to. Nor could he be sure that Herbert had in fact reported those killings to brigade."

Defendant Lando knew that Hill had supported plaintiff in an interview with defendant made in 1972 and had stated that plaintiff spoke over the radio that day over the brigade net, a communication link which went directly only to brigade headquarters. Upon information and belief, defendant Lando misrepresented and distorted said interview in "Affair" as quoted above to carry out his malicious intentions to make plaintiff appear to be a liar.

Complaint

(e) "We also contacted a former chopper pilot, now a civilian, who claimed he had picked Franklin up at Cam Ranh Bay when he returned, and it was after February 14."

Upon information and belief, defendant Lando knew that Cam Ranh Bay was beyond the landing area for 173rd Brigade helicopters and that there were no helicopter flights between Cam Ranh Bay and the Brigade headquarters, and that defendant Lando failed to reveal the existence of persons known to him and/or interviewed by him who supported plaintiff's version of the statements that Franklin returned to headquarters in Vietnam on or before February 14.

(f) Upon information and belief, defendant Lando maliciously failed to reveal during his discussion of the dates that Franklin claimed to be in Hawaii on R & R (Exhibit B, pages 5-6), that the hotel receipt demonstrates a significant reduction in room charges on and after February 13, 1969, thereby supporting plaintiff's statements that Franklin had returned to Vietnam on or before February 14.

(g) By following the discussion set forth in (f) above with the republication of a segment of "Selling" depicting portions of an interview between plaintiff and defendant Wallace, defendant Lando maliciously sought to further emphasize his false and misleading statements regarding Franklin's presence in Hawaii. Said segment was republished notwithstanding the malicious and false manner in which "Selling" was written, edited, produced and broadcast as herein alleged and notwithstanding the oppressive, unusual and hostile circumstances under which plaintiff's interview was conducted, as herein alleged.

43. "Affair" conveyed the false and malicious impression that plaintiff was a liar and that his statements and

Complaint

his book "Soldier" were false and untruthful by reason of the following specific passages thereof, as well as in its entirety:

(a) "Most of *Soldier* is a melange, a kaleidoscope of truth, half-truth, and fabrication."

Upon information and belief, defendant Lando knew that such statement was false, that "Soldier" was a truthful account and that interviews conducted by defendant did not support this false and defamatory charge.

(b) "A few weeks later, after Hill had had a chance to read *Soldier*, I spoke with him again. 'Herbert is the best battalion commander I ever had', he said. 'But for some reason he's become a liar, it's all so much garbage.'

Upon information and belief, defendant Lando elicited the alleged statement from Hill by reading to him certain portions of the uncorrected galley proofs of "Soldier" and/or misrepresenting their contents to suggest plaintiff had attacked Hill, in order to goad him to anger at plaintiff; defendant Lando knew that Hill had not read "Soldier" and further that the passages involved were taken out of context or otherwise distorted to cause Hill to doubt plaintiff's integrity and motives; defendant Lando knew that Hill would have reacted differently to "Soldier" had he read the final version; defendant Lando also knew that Hill agreed with the contents of "Soldier", of which he had personal knowledge, as it was finally published.

(c) By following the passage set forth in (b) above with the republication of a segment of "Selling" depicting portions of an interview between defendant Wallace and plaintiff discussing Hill, defendant Lando maliciously sought to further emphasize the false impression of Hill's remarks concerning plaintiff, that Hill neither believed nor supported plaintiff as herein alleged in paragraph

Complaint

"29(j)". Defendant Lando republished such segment notwithstanding the malicious and false manner in which "Selling" was written, edited, produced and broadcast as herein alleged.

(d) "After talking with scores of men who had known Herbert in Vietnam, many of whom still admire him, we could not find a single person who believed that Herbert had been relieved for trying to get war crimes investigated. Most gave other reasons, from personality conflict between Franklin and Herbert, to Barnes' claims that Herbert could not be trusted, could not get along with the brigade staff, or might be using too much firepower against civilian-populated areas."

Upon information and belief, defendant Lando interviewed many persons who believed that plaintiff was relieved from command as a reaction to plaintiff's efforts to have war crimes investigated and supported plaintiff's statements in this regard and falsely stated that not a single person could support plaintiff.

(e) "Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outer office when Herbert reported to Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia, to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? I asked. He had no sons."

Defendant Lando falsely stated that Bittorie had no sons; upon information and belief, defendant Lando further misrepresented and distorted Bittorie's statements

Complaint

concerning plaintiff's charges so as to make it appear that he could not substantiate plaintiff's story; defendant Lando further failed to disclose that Bittorie had not wished to speak with Lando, that he was pressured into doing so by Army personnel acting in concert with defendant Lando.

(f) "Over the next few weeks, *Sixty Minutes* researcher Mark Frederiksen and I spoke with more than a hundred and twenty people who had known Herbert throughout his career. Some of them had been mentioned in *Soldier*. One after another refuted many of Herbert's claims".

Upon information and belief, defendant Lando's statement that they talked to 120 persons who refuted plaintiff's claims is false; defendant Lando interviewed or was aware of the existence of many persons mentioned in *Soldier* and/or who had served with plaintiff who backed plaintiff totally; defendant Lando was further aware of the results of investigations made by other reporters in which these persons fully supported plaintiff; defendant Lando intended by this passage to create the false and defamatory impression that plaintiff had lied.

(g) ". . . proving Herbert was telling the truth . . . turned out to be difficult. When I started contacting the people to whom Herbert had directed me, they were, when pinned down, not able to substantiate Herbert's claims, not even on an off-the-record basis. Even as my doubts grew, Herbert kept furnishing new names, new facts, new explanations."

Upon information and belief, defendant Lando inserted this false and malicious statement in "Affair" to further cast plaintiff as a liar whose statements could not be supported or substantiated, notwithstanding defendant's personal knowledge of many persons who did support plaintiff as herein alleged.

Complaint

44. "Affair" conveyed the false and malicious impression that plaintiff had never complained of the failure of the Brigade Officers Barnes and Franklin to pursue the atrocity and war crime charges until after My Lai became a matter of great public concern and that plaintiff, for his own opportunist personal ends, took advantage of such concern, by reason of the following specific passages thereof, as well as in its entirety:

(a) "There is an inexplicable gap of almost eighteen months between the time Herbert was relieved, April 5, 1969, and the day he formally brought his war crime charges to the Army CID September 28, 1970. Herbert claims he was constantly trying to get his charges investigated during that period, but he has no written evidence whatsoever to back up his claim."

Upon information and belief, defendant Lando falsely and maliciously made the above-quoted statement when he knew that plaintiff was working on his war crime charges and command cover-up during the said period between April 5, 1969 and September 28, 1970, and defendant specifically referred therein to "no written evidence" to falsely infer defendant did not know of plaintiff's activities regarding the charges during the said period and to imply that there was no other evidence.

(b) "According to Herbert, during the several months he spent at Fort Leavenworth, Kansas, after leaving Vietnam, he worked ceaselessly, spent \$8000 of his own money, getting statements, contacting witnesses, all to buttress his war crime case.

"Herbert does have several statements from officers praising him as a commander, which he used to appeal the damaging efficiency report in his record; but there is not a word relating to war crimes.

"It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai

Complaint

trials were in full swing, that there is any solid indication he was thinking about reporting war crimes."

Upon information and belief, defendant Lando falsely and maliciously made the above-quoted statement when he knew that plaintiff, while at Fort Leavenworth, Kansas, was working on his charges of war crimes and command cover-up.

(c) "Nowhere in the entire one hundred and sixty pages of transcript of the official inquiry into Herbert's relief is there any mention by Herbert of war crimes. Why? Herbert first claimed that Army regulations prevented him from including war crime charges in his appeal. Army regulations say nothing of the kind."

Upon information and belief, defendant Lando falsely and maliciously created the impression that plaintiff could have included his charges of atrocities, command complicity and cover-up in the named inquiry, thereby causing plaintiff to appear to have lied about his efforts to have his charges investigated, when defendant knew Army regulations prohibited such inclusion, had seen such regulations and falsely stated their contents.

(d) By following the passage set forth in (a) above with the republication of a segment of "Selling" depicting portions of an interview between defendant Wallace and Colonel John Douglas, defendant Lando attempted to strengthen his false statement that plaintiff had made no effort to have his charges investigated. Defendant Lando knew such statement was false as herein alleged and republished said segment notwithstanding the mali-

Complaint

cious and false manner in which "Selling" was edited, written, produced and broadcast as hereinabove alleged.

- (a) "The Army also produced an official 'fact sheet' disputing Herbert's claims point by point. According to the Army, of the twenty-one allegations made by Herbert to the CID, only seven 'had sufficient substance to warrant action or further investigation'. Of those, three had already been investigated in Vietnam and one was a case that was not under U.S. jurisdiction."

Upon information and belief, defendant Lando created the impression that the Army "fact sheet" was entitled to special credibility rather than a partisan document biased against plaintiff, and further falsely stated that plaintiff had made 21 allegations of which only seven were substantiated, thereby making plaintiff appear to have lied about or falsely exaggerated his charges when defendant Lando knew that plaintiff made 8 charges, 7 of which were substantiated and the eighth not pursued because the individuals involved were dead.

45. "Affair" conveyed the false and malicious impression that plaintiff was a revengeful man who was only concerned with his own personal career and for those purposes improperly exploited the nation's concern over war crimes and that plaintiff was not what he pretended to be, by reason of the following specific passages thereof, as well as in its entirety.

"What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.

* * *

Complaint

"The press, which long had been negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we brought ourselves a martyr with feet of clay."

Upon information and belief, and for the reasons herein alleged, the said statements were maliciously made by defendant Lando to deliberately create a false and defamatory impression of plaintiff.

46. "Affair" conveyed further false and malicious impressions regarding plaintiff, including the following:

(a) That plaintiff had written "Soldier" for the possible money he might receive by falsely stating: "Herbert had shared advance payments of more than \$100,000 with Jim Wooten and their agents for the book." Upon information and belief there was no reason to publish this false statement except defendant Lando's malicious intention to impugn plaintiff's concern regarding war crimes, the cover-up of the crimes and the operations of United States military forces.

(b) That plaintiff was a self-centered egotist by falsely stating that when defendant Lando met plaintiff he "had a chestful of decorations" and, upon information and belief, that defendant Lando knew that plaintiff did not and had not worn any decorations since his return from Vietnam in 1969 and that such false statement was maliciously made to impugn plaintiff's reputation as herein alleged.

(c) That plaintiff sought to gain publicity by exploiting a false issue by reason of falsely stating that "it was only by claiming to be a martyr that Herbert had gained such national prominence.

(d) That false statements implying plaintiff was a paranoid individual were inserted by defendant in an attempt to diminish his own malicious objectives and conduct; as shown in the following statement:

Complaint

"As soon as Mike Wallace's TV interview with him was filmed, Colonel Herbert turned on me, in his eyes an admirer now turned enemy, and challenged me to deny that I had originally wanted to write a book about him. I was startled; of course that was true, but I had almost forgotten it. In fact, my interest in collaborating with him had ended even before I developed doubts about his story. . . .

"Herbert kept pressing the point, intimating that all along I had been engaged not in journalism but a vendetta. Angered, I told him that if he went on in this way I would "get" him, that I had recourse to libel action. I came to regret that outburst, because subsequently Colonel Herbert was to cite this confrontation as proof that the CBS television show was a willful plot on my part to discredit him (an impossibility, since others have the last say about the content and purposes of *Sixty Minutes*) and to defile his true story."

Upon information and belief, defendant Lando falsely stated, as herein alleged, that his alleged "doubts" about plaintiff were unrelated to plaintiff's refusal to collaborate, and defendant further falsely distorted his remarks to plaintiff as herein alleged and plaintiff's reactions thereto to create the impression that plaintiff was unstable, and defendant further made this false statement without revealing the oppressive and unusual circumstances surrounding said interview as hereinabove alleged in Paragraph "26".

47. Defendant Company adopted, confirmed and ratified the aforesaid false and defamatory statements contained in "Affair" as well as the article in its entirety and defendant published such adoption, confirmation and ratification as an introduction to said "Affair" in the words set forth on page one of Exhibit B herein annexed and incorporated.

Complaint

48. Upon information and belief, at the time of said publication alleged in paragraph "37", defendant Company knew that said "Affair" was false and was intended to destroy plaintiff's reputation and to portray plaintiff as a liar and a brutal and vindictive man.

49. Upon information and belief, at the time of said publication alleged in paragraph "37", defendant Company knew the matters contained in "Affair" as well as "Affair" as a whole to be directly in conflict with the views and knowledge of people other than defendant Lando, and with reckless disregard as to the truth or falsity of said matters and as to the harm done to plaintiff, defendant company published "Affair" as a true portrayal of plaintiff and his conduct.

50. Upon information and belief, after the publication of "Affair" by Defendant Company as herein alleged the false and malicious nature of "Affair" and its defamatory effect upon plaintiff were again brought to the attention of defendant Company. Representatives of plaintiff and persons with knowledge of the false and malicious manner in which "Affair" was written and published requested a retraction or other response by defendant Company on behalf of the truthful facts concerning plaintiff but defendant Company declined to do so and further ratified and affirmed the malicious content and intent of "Affair."

51. The conduct of defendants Lando and Company at all times herein, as set forth above, deliberately and maliciously defamed plaintiff, was accomplished by means which radically departed from usual and normal professional standards of journalism, and resulted in the national publication, circulation and distribution of "Affair" which created and presented false and distorted information and impressions known to defendants to be false and distorted but published with reckless disregard of whether or not they were false and distorted.

Complaint

52. By reason of the aforesaid acts of defendants Lando and Company, the publication and circulation of "Affair" caused plaintiff to suffer the following special damages: (a) the publication, distribution and circulation of "Affair" further impaired the value of "Soldier" as a literary property and caused sales to be below expectations; (b) offers and discussions regarding sale of motion picture rights to "Soldier" which took place prior to the publication of "Affair" were discontinued after its publication and no movie rights have been sold; (c) offers and discussions regarding the sale of rights to a filmed lecture series to television, industry and educational institutions which took place prior to the publication of "Affair" were discontinued after its publication and such rights have not been sold; (e) plaintiff's paid speaking engagements and public appearances dropped sharply immediately after the publication of "Affair" and have continued to be far less than prior to such broadcast, all to his special damage in the sum of Two Million Two Hundred Twenty Five Thousand (\$2,225,000.00) Dollars.

53. By reason of the aforesaid acts of defendants, plaintiff has been grievously injured in his good name, character and reputation; plaintiff's reputation among the American public in general as a courageous and honest person dedicated to the welfare of his country has been seriously impaired; plaintiff's reputation, both to the general public and to his friends, acquaintances and former colleagues in the armed forces, as a professional soldier of high moral character has been destroyed; plaintiff's good name and character acquired over many years of dedicated service to his country has been deeply damaged, and plaintiff and his family have been held up to ridicule and contempt by friends, acquaintances, neighbors and the public in general, all to his general damage in the sum of Ten Million (\$10,000,000.00) Dollars.

Complaint

WHEREFORE, plaintiff demands judgment:

- (1) against defendants Lando, Wallace and CBS, on the first count in the amount of Twelve Million Five Hundred Thousand (\$12,500,000.00) Dollars as compensatory damages and Ten Million (\$10,000,000.00) Dollars as exemplary damages, with interest thereon, together with the costs and disbursements, including fair and reasonable allowances for counsel fees and other lawful expenses;
- (2) against defendants Lando and Company on the second count in the amount of Twelve Million Two Hundred Twenty Five Thousand (\$12,225,000.00) Dollars as compensatory damages and Ten Million (\$10,000,000.00) Dollars as exemplary damages, with interest thereon, together with the costs and disbursements, including fair and reasonable allowances for counsel fees and other lawful expenses.

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Exhibit A, Annexed to Complaint

60 MINUTES

Volume V, Number 9

as broadcast over the

CBS TELEVISION NETWORK

Sunday, February 4, 1973

6:00-7:00 PM, EST

With CBS News Correspondents Morley Safer and
Mike Wallace

PRODUCED BY CBS NEWS

EXECUTIVE PRODUCER: Don Hewitt

(1) DICK CAVETT: Will you welcome, please, Lieutenant Colonel Anthony Herbert. [Applause]

MIKE WALLACE: As millions of viewers watched, Lieutenant Colonel Herbert described one of the war crimes he said that he had witnessed in Vietnam.

HERBERT: He had a woman by the hair with her head bent back . . . and he had his right arm around her throat with the knife dug in right here. And there was a child holding her leg, screaming, and he had another—the second child buried face-down in the sand with his foot on his head, suffocating him.

WALLACE: And you say it was your insistence on having war crimes investigated that led to your relief from command, right?

HERBERT: I still say it.

WALLACE: Did Colonel Herbert ever report war crimes or atrocities of any nature to you, Colonel Franklin?

COLONEL ROSS FRANKLIN: No.

WALLACE: Never?

FRANKLIN: Never.

Exhibit A, Annexed to Complaint

MORLEY SAFER: After a week or two weeks of prodding and pushing, of relentless competition, of harassment and baiting, of the kind of abuse that would get any self-respecting Englishman up in arms if it were animals treated thus, the vacation is almost over.

I'm Morley Safer.

WALLACE: I'm Mike Wallace. Those stories and more, tonight on 60 MINUTES. First, these headline items.

The first American POWs will begin to return from Hanoi by midweek. This, according to a Canadian member of the International Control Commission in Saigon.

Also in Saigon today, North Vietnamese and Viet Cong officials had their first public outing, passing out cigarettes to journalists, answering the questions of passers-by and generally trying to be friendly.

But in Belfast, Northern Ireland, the past 24 hours have been the bloodiest of the year: 10 persons dead, 20 wounded.

60 MINUTES continues in a moment.

(2) [Announcements]

[“THE SELLING OF COL. HERBERT”]

WALLACE: One of the sad legacies of our years in Vietnam is the distrust of the American military establishment the war planted in the minds of millions of Americans. The Pentagon's efforts to obscure the facts, from Tonkin Gulf to My Lai to General Lavelle, seriously damaged the credibility of the military. And one man who helped to breed suspicion in our minds was Army Lieutenant Colonel Anthony Herbert, now retired.

For the past two years Herbert has been stating and repeating his charges that the American military covered up war crimes in Vietnam. Now he has published a book called “Soldier” which he wrote with James

Exhibit A, Annexed to Complaint

Wooten of *The New York Times*. Its publisher is Holt, Rinehart and Winston, a subsidiary of CBS. The book is a savage indictment of the Pentagon in general and some of its top officers in particular. A good deal of Herbert's firepower aims at proving that his military career was destroyed by the Pentagon only because he tried to report war crimes, atrocities, in Vietnam to his superior officers. They wanted to hear none of it, he says, and they broke him because he persisted.

60 MINUTES set out to investigate the validity of Herbert's allegations. In the course of the last year, producer Barry Lando talked with scores of people in and out of the service—people who have known Herbert and the Army. Here is our report.

DICK CAVETT: My first guest tonight is one of America's great war heroes. And he is also one of its war victims. It's an astonishing story. I'll let him tell the rest of it. Will you welcome, please, Lieutenant Colonel Anthony Herbert. [Applause]

WALLACE: "The Dick Cavett Show"—December 30, 1971. As millions of viewers watched, Lieutenant Colonel Herbert described one of the war crimes he said that he had witnessed in Vietnam. Since it took place on February 14, 1969, he calls it the "St. Valentine's Day Massacre".

HERBERT: We had a woman by the hair with her head bent back—there were four dead males lying on the ground by now—and he had his right arm around her throat with the knife dug in right here. And there was a child holding her leg, screaming, and he had another—the second child buried face-down in the sand with his foot on his head, suffocating him.

CAVETT: Who were the men who were doing this, now?

HERBERT: They were Vietnamese, but under an American's charge.

CAVETT: They would be ARVN?

Exhibit A, Annexed to Complaint

HERBERT: Well, they were police, is what they really were. They were national police. And just as I looked, he cut the woman's throat and dropped her into the sand. So this made five dead now.

(3) WALLACE: As Herbert tells it, then and now, he tried repeatedly to have this and other alleged war crimes investigated by his commanders in Vietnam. As a result, he says, he was relieved of command and had his career ruined by an Army establishment intent on covering up atrocities.

HERBERT: For people to think that Ernie Medina could have reported those crimes is ridiculous. If Ernie Medina had reported those crimes he'd have been—the bolt of lightning would have came out of the blue so fast that he wouldn't have known what the hell hit him, you know.

WALLACE: There seemed to be good reason for the attention Colonel Herbert has gotten from the public and the media: he was a hero. After all, even the Pentagon had to admit his Army record was outstanding.

He had enlisted at the age of 17, won 22 medals in some of the bloodiest fighting in the Korean War, wrote an account of his exploits, traded books with World War II hero Audie Murphy. He shot up through the ranks of commissioned officers, served as a Ranger, had duty tours in Europe, the Middle East. Then in February 1969 he was given a combat command in Vietnam. His unit: the 2nd Battalion of the 173rd Airborne, based south of Danang. Again Herbert excelled. In only 58 days he won a Silver Star and three Bronze Stars. But then, abruptly, in April of 1969, he was relieved of command by the same officer who had given it to him, General John Barnes.

BARNES: I thought he was a killer. I thought he enjoyed killing and I thought that he would cause me a lot of trouble in the pacification. I don't think he understood the role.

Exhibit A, Annexed to Complaint

BARRY LANDO: Do you have any evidence, hard evidence, to show that he was a killer?

BARNES: No, I have no hard evidence other than the fact I know that he enjoyed getting out with squads with an M-16 and leading squads. No other battalion commander did that.

LANDO: Couldn't this just be a sign of bravery?

BARNES: Oh, it certainly could. But the same kind of a thing I didn't want happening in—when we got to the pacification role.

WALLACE: General Barnes elaborated his suspicions about Herbert.

BARNES: I can't pin this thing anywhere, but I just got the feeling, with all these high body counts he had, that some of them were suspect. And that—he would tell different stories as to the body count. He'd come in one day and I'd get a report that so many people were killed, and then when I tried to get the details of it there would be a different figure table. And I just didn't have confidence in him. I'd lost confidence in him as a commander with the ability to control his people.
(4) LANDO: Did Colonel Herbert ever formally or informally report any war crimes or atrocities to you?

BARNES: He himself never did to me. Absolutely not. If he had, I would have taken the same action I did when I learned of atrocities anywhere. If they are under my responsibility, I would have court-martialed the man responsible for it, as I told every replacement that came into the brigade.

WALLACE: General Barnes' deputy commander was Colonel Ross Franklin. It was he who recommended to Barnes that Herbert be relieved. One reason, says Franklin, is that he had come to feel he could not trust Herbert's word.

FRANKLIN: Tactically, he was the best battalion commander we had. I counseled Herbert several times and once I counseled him on telling the truth or being

Exhibit A, Annexed to Complaint

more exact in what he said. I told him at that time he could run circles around all the rest of the battalion commanders if he'd just tell the truth.

WALLACE: Did Colonel Herbert ever report war crimes or atrocities of any nature to you, Colonel Franklin?

FRANKLIN: No.

WALLACE: Never?

FRANKLIN: Never.

WALLACE: Verbally or in writing?

FRANKLIN: In no way, neither orally or in writing. This—I had many conversations with Colonel Herbert. We discussed many things, but never war crimes.

WALLACE: After losing his command, Herbert went to Saigon. He requested a formal hearing. An investigation was held. His appeal was denied. Herbert returned to the U. S., was ultimately assigned to Fort McPherson, Georgia. And then in September 1970, 17 months after he had been relieved of command, with the headlines filled with news of the My Lai trials, Colonel Herbert filed his war crimes charges with the Army Inspector General. Six months later, Colonel Herbert went public.

Why would Herbert make such charges if they were just baldly untrue?

FRANKLIN: There's a certain amount of vindication, certainly. I would say that he probably holds me more responsible for what happened to him than any other officer.

WALLACE: Being relieved of his command?

FRANKLIN: Yes, but I can't really imagine the motivation that would lead to such a monumental thing such as this.

(5) WALLACE: Monumental? What's monumental?

FRANKLIN: He has come up with totally fictional charges that, as far as I'm concerned, has been a hoax on the American people.

Exhibit A, Annexed to Complaint

WALLACE: You were relieved. You were given a bad efficiency report.

HERBERT [agreeing]: Mm-hmm.

WALLACE: And you say it was your insistence on having war crimes investigated that led to your relief from command, right?

HERBERT: I still say it.

WALLACE: Okay. Now, in almost all the cases that you claim that you reported war crimes, either to Colonel Franklin or General Barnes, we have only your word against theirs. Nobody else was there.

HERBERT: Mm-hmm.

WALLACE: So what we decided to do was to zero in on the one case where there's a possibility, anyway, of proving who's telling the truth—without relying on your word against their word.

HERBERT: Mm-hmm.

WALLACE: And that's the incident of February 14—the "St. Valentine's Day Massacre," as you've called it. Now, what happened there, briefly?

HERBERT: What happened?

WALLACE: Yeah.

HERBERT: A platoon, I believe it was from B or C Company—

WALLACE: As Colonel Herbert tells it, he spoke with Colonel Franklin twice from the field on February 14. Then, he says, he flew directly back to Landing Zone English to report the killings personally to Franklin.

Well, specifically, on February the 14th in 1969, Colonel Herbert said that he reported to you, first on the radio and then in your command post, the killing of captured Vietnamese by South Vietnamese police while an American adviser was looking on.

FRANKLIN: At that period I was in the Ilikai Hotel in Honolulu, Hawaii, on R & R. I did not return to Vietnam until 16 February, two days after this alleged incident.

Exhibit A, Annexed to Complaint

HERBERT: I say that he was there.

WALLACE: And that he's lying!

HERBERT: If he says he wasn't there, I say he's lying.

(6) WALLACE: Can you prove it?

HERBERT: No, I cannot.

WALLACE: 60 MINUTES tried to find out who was telling the truth. Checking with the Ilikai Hotel in Hawaii, we found that Colonel and Mrs. Franklin had indeed been registered there from February 7 to late in the afternoon of February 14. That would already have been February 15 in Vietnam. Colonel Franklin also gave us a cancelled check signed by himself and made out to the Ilikai Hotel for the exact amount of the hotel bill. The check was dated February 14. And we spoke with two Army officers who were in Hawaii at the same time. They say they flew back to Vietnam with Colonel Franklin, taking off from Honolulu late on February 14, arriving at Camranh Bay in Vietnam on February 16, local time.

Let me provide something to you.

HERBERT: Okay.

WALLACE: A check, signed by Ross Franklin, 14 February, in Hawaii, for the full amount of that hotel bill that you have there, which means that he had to be in Hawaii to pay his bill himself on the 14th of February; therefore could not have been where you said he was on the 14th of February.

HERBERT: Mm-hmm. I can probably find you checks—I don't know. I can probably find you—I don't know about this check. I can probably find—

WALLACE: Wait a minute. I mean, you say—

HERBERT: I see the check.

WALLACE: Yeah, okay.

HERBERT: I can probably find you a hundred checks that I have either dated for another reason, wrote after the fact, misdated, what have you. I don't know. All

Exhibit A, Annexed to Complaint

I know is I saw Ross Franklin there and talked to him. I know that. I know what I saw. I know what I did. And I stick by it and I still say it. And I swear to it and I've sworn to it under oath and I'll swear to it again, you know?

WALLACE: In his book, Colonel Herbert writes that there are several people who can testify that Franklin was in Vietnam on February the 14th. We asked Herbert for the names of those men. We contacted almost every one of them. None could confirm Herbert's claim. Several men serving under Herbert said they had heard Herbert say, while in Vietnam, that he had reported the February 14 killings, but none were certain that he had actually reported them.

BARNES: Why didn't he do something that had a date on it that would prove that he did report those things? He had plenty of time to do it. He left the brigade, he was down in Saigon three months where he (7) had this court of inquiry, this Article 138. He had plenty of time to get something down on a piece of paper, to get it notarized. Why didn't he?

WALLACE: You have no documents to show, not a piece of paper to show that you ever reported a war crime to anybody prior to the time that the My Lai trials were going on at Fort McPherson in Georgia. You were in Fort McPherson, Georgia, at the very same time that those My Lai trials were going on and then suddenly you went public.

HERBERT: Let's say that we—I'm not going to say we don't have documents to show that I reported war crimes in Vietnam. That's not for me to say here. I say that we can prove that I did report them in Vietnam.

WALLACE: You have documents to prove—

HERBERT: I'm not going to say we have documents or not. I just say we have statements—sworn statements—and testimony that will prove that I reported war crimes in Vietnam.

Exhibit A, Annexed to Complaint

WALLACE: Have you—have you published them in your book?

HERBERT: I don't think so.

WALLACE: Why?

HERBERT: I didn't—I had no reason to. It was already in the paper, other things. I don't know why. I have lawyers, just like you have lawyers. We didn't put everything out we have.

WALLACE: Earlier, Herbert had tried to put the whole question of his reporting or not reporting atrocities in a different light.

HERBERT: Let's say I didn't, just for the sake of discussion. It would make absolutely no difference if I waited five years to do it. The motive would make no difference whatsoever. The question is: did the crimes occur or didn't they?

WALLACE: Oh.

HERBERT: Were Colonel Franklin and General Barnes well aware of them or weren't they? I say they were and I say I reported them, and it's still there and it still stands.

WALLACE: No. The point is there's no dispute that war crimes occurred in Vietnam. The dispute, it seems, is this: You've called Franklin a liar.

HERBERT: Yes.

WALLACE: You've called Barnes a liar.

HERBERT: Yes.

(8) WALLACE: You said the Army, really, deprived you of your military career because you insisted upon reporting war crimes and they wanted them covered up. And that's really what the issue is here.

HERBERT: And I still say it.

WALLACE: The sprawling U. S. Army base at Long-binh, just outside Saigon. After he lost his battalion, Colonel Herbert went to Longbinh to appeal his relief from command—and also, he says, to present his war crimes charges. One of the officers he spoke with was

Exhibit A, Annexed to Complaint

the top U. S. military lawyer and judge in the country, Colonel John Douglass. Herbert claims that Douglass listened to his story and then told him he wouldn't touch war crimes charges against a general with a ten-foot pole.

DOUGLASS: The story, of course, is not correct. He has not recalled the facts, apparently, as they really existed.

WALLACE: All right, what were the facts?

DOUGLASS: Well, the facts as they really existed were that he was brought to my office by an assistant inspector general, as I recall it. That officer explained that Colonel Herbert had been relieved of command and had a complaint about his relief. I said, "Well, I better turn this over to my assistant, Colonel Rector"—who was in the room right next to mine—

WALLACE: Wait a minute. Did he mention war crimes to Colonel Rector?

DOUGLASS: I don't know. If he did, he never mentioned—Colonel Rector never told me about them. And as a matter of fact, Colonel Rector's comments to me were that his complaint was that he'd been improperly relieved and he'd—there was some jealousy, some hard feelings between Franklin and whoever the general was up there, and Herbert.

WALLACE: Barnes.

DOUGLASS: General Barnes and Colonel Herbert. And that he'd been improperly relieved. And it looked like enough of a case that we ought to get a full investigation. I can't believe that if there were war crimes involved and we were trying to stay out of it, as indicated by this passage you've just read to me, that then we'd recommend a full-scale investigation—which we did.

WALLACE: Douglass said that he was irritated by the implication that he wouldn't bring charges against a general.

Exhibit A, Annexed to Complaint

DOUGLASS: And I am annoyed, I'm hurt, I'm—I feel that this is an indication that I'm not of a strong enough character to be either a lawyer or an Army officer, and I happen to be both and I'm proud of being both.

WALLACE: But why haven't you said this up to now?

(9) DOUGLASS: Nobody's asked me.

WALLACE: He says you—He's a gentleman, so he won't—

HERBERT: Yeah, and I'm not.

WALLACE: —so he won't call you dirty names, but he says that it's absolutely made up out of the whole cloth. He said that he barely talked to you, you didn't mention war crimes, that he bucked you to his next-in-command, a fellow by the name of Rector.

HERBERT: That's not true. I never saw Rector, ever.

WALLACE: Okay.

But when 60 MINUTES contacted Colonel Rector, he said that he had indeed spoken with Colonel Herbert at some length about his relief from command, but that Herbert never claimed that war crimes had anything to do with it.

In fact, over the past several months, we have spoken with many men who saw Herbert after his relief in Vietnam. Some are still in the service, some are out. Most of them admire Herbert, yet to a man they say that Herbert never once said to them that he had been relieved because he had tried to push war crimes charges.

You claim that the investigation into Barnes and Franklin, conducted by the Army and based on your charges, was a whitewash, right?

HERBERT: Mm-hmm.

WALLACE: Do you remember an attorney by the name of Ken Rosenbloom?

HERBERT: Yes, I do. I was the one that put you in contact with him.

WALLACE: Right.

Exhibit A, Annexed to Complaint

While in the Army, handling the Barnes investigation, Ken Rosenbloom was a captain in the Judge Advocate General's Corps. He is now an assistant district attorney on Long Island in New York.

Now, he has charged, as Herbert has charged all along, that the Army's investigation into charges against General Barnes were a whitewash. You worked on the Barnes investigation.

ROSENBOOM: That's correct. I did.

WALLACE: What do you think?

ROSENBOOM: It certainly wasn't a whitewash. We traveled all over the country. We took thousands and thousands of pages of transcript. We spoke to witnesses in person and over the telephone. We had access to all the CID files. We were refused nothing and we were permitted to go anywhere that we desired and talk to anyone we desired, in or (10) out of them. We had all of the Army's facilities made available to us, anywhere we wanted to go, we went.

WALLACE: You were present throughout the whole business of investigating Herbert's charges against General Barnes?

ROSENBOOM: Yes, I was, sir.

WALLACE: And you came up with a verdict that the charges just didn't hold water?

ROSENBOOM: Essentially that's correct, sir. I tried to approach it in a very open minded way. I have no grudge against the Army, no grudge against Herbert. I knew I was getting out. I was not a career man and so I had no desire to protect the Army nor did I have a desire to protect Herbert.

WALLACE: Are you trying to set the record straight about Anthony Herbert?

ROSENBOOM: I don't know if the record requires to be set straight. Nobody ever asked me before what happened at the investigation.

Exhibit A, Annexed to Complaint

WALLACE: He says no cover-up. He says that they tracked down every lead that he gave them—many of them provided by you—and more. And when they contacted those people they just could not confirm what you said they knew or had seen.

HERBERT: Than let them present the statements and the evidence. I told you the other military lawyer is Dick Heintz, who will verify what we have said. There are—The documents are there. Then let the Army release all the documentation and let the people judge for themselves.

WALLACE: We contacted Herbert's military lawyer, Captain Heintz. He said that, from the few documents that he had seen, he suspected the Army was not doing its best to investigate Herbert's charges. But he said that he could not be at all certain of that until the full investigations are made public.

Another thing that we found out checking out Herbert's book: Although several men who served with Herbert say it's not so, there are others who claim that Herbert was an officer who could be brutal with captured enemy prisoners himself.

You used to have a radioman by the name of Bruce Potter, right?

HERBERT: Yes, I had. Sergeant Bruce Potter.

WALLACE: A man you've spoken highly of and who speaks highly of you.

HERBERT: And I still do, no matter what [indistinct] I still do.

WALLACE: All right.

(11) POTTER: One day we captured two detainees and we had an interpreter with us. We were on a recon mission. And we took one of the detainees in the air, because neither of them would talk on the ground. And we took him in the air and Colonel Herbert held him in the door of the helicopter. The helicopter then made a bank to the left and Colonel Herbert jolted him a little

Exhibit A, Annexed to Complaint

bit to scare him into talking—to think he was going to be thrown out the door. And the interpreter that was with us in the helicopter was questioning him constantly through the flight. And the helicopter then made another bank over the mountains and Colonel Herbert gave him a bigger jerk out the door, and he started talking. And then we flew across the area where the other detainee was being held and threw a sandbag out full of clothes and rocks and things of this nature into the area where he was. He was blindfolded on the ground. And he apparently started talking then, because he was talking very well when we came down. And both of them—We got quite a few—quite a bit of information out of them. They were trail watchers.

LANDO: He started talking why?

POTTER: Because he thought that the other detainee we took in the air was thrown out of the helicopter and that was him hitting the ground rather than the sandbag. This was a method that was thought up on the spur of the moment, I believe, and it worked, definitely worked.

LANDO: Who thought it up?

POTTER: It must have been Colonel Herbert. Had to be.

HERBERT: This is not true.

WALLACE: In other words, Potter's a liar!

HERBERT: No, Potter's mistaken. Potter may remember somebody doing that—

WALLACE: No, no, no, no. Potter told us that he was with you, Colonel Herbert, in the chopper as it went on and he said it was your idea.

HERBERT: I understand what you are saying that Potter said. I say that it is untrue—

WALLACE: All right. All right, now—

HERBERT: —you know?

WALLACE: —another man: Bob Stemmies.

HERBERT: Bob Stemmies?

WALLACE: Do you know him?

Exhibit A, Annexed to Complaint

HERBERT: No, he wasn't—didn't work for me, but I do know him, yes.

(12) WALLACE: Well, he was a military intelligence sergeant.

HERBERT: Yes.

WALLACE: You spoke very highly of him on the Cavett show back in '71—September.

HERBERT: Yeah, I spoke—Well, I knew about him as an IG, yes.

WALLACE: Stemmies told us that he was present once with you as a Viet Cong nurse was being interrogated by ARVN troops, being beaten by them to get her to talk, you were there, stood by, did nothing.

HERBERT: Well, let me tell you this. As long as I was in Vietnam, my unit never captured a single nurse. And you won't find anything about a nurse in any of our records.

WALLACE: Do you remember a chopper pilot by the name of Mike Plantz?

HERBERT: No, because Mike—I don't remember him, because Mike Plantz never flew me in Vietnam.

WALLACE: He was based at Landing Zone English.

HERBERT: Yes.

WALLACE: He claims that he was flying a chopper for you, saw you beat up a woodcutter after you went down to check a group of them out; also says that he saw you beat up a VC prisoner being brought back by you to Landing Zone English.

HERBERT: It's false. It's false.

WALLACE: Bill Hill, one of your top company commanders—

HERBERT: Yes.

WALLACE: —has told us that Herbert "is the best battalion commander I've ever had, but for some reason he's become a liar. It's all so much garbage."

Exhibit A, Annexed to Complaint

HERBERT: If he's still in the Army, he will do the same as other officers will do, I'm sure, in order to keep their career going. These men are not going to destroy themselves.

WALLACE: In other words, he has simply chickened out and is going along with the Army line against Herbert?

HERBERT: I don't know.

WALLACE: Well, that's what you're suggesting.

HERBERT: I don't even know he said it. You're telling me he said it. But I'm sure he did say it if you say he did. I'm telling you, if Bill Hill feels I'm lying, he's entitled to have that opinion, right?

(13) WALLACE: In checking out Herbert's book, "Soldier," we found numerous stories that, according to the people mentioned in those stories, are not true. One such man is Major Jim Grimshaw, a former company commander who served under Herbert in Vietnam. He thinks that many of the charges in Herbert's book, like the politicking that goes on among Army officers—especially West Point officers—are true. Like many of the officers who served under Herbert, Grimshaw has the highest praise for him. When I interviewed him in the Pentagon, Major Grimshaw was frank to admit his admiration.

GRIMSHAW: I would stick up for Tony Herbert for anything. I'd follow him in combat because I don't think I could keep up with him, he was such a fine combat leader. However, I feel that as an individual, let alone an Army officer, a man must have integrity. Therefore, I would not lie for him or for anybody else.

WALLACE: I asked Jim Grimshaw about the stories in the book that related specifically to him. The most dramatic involved an incident where he and his men supposedly tried to flush some Viet Cong soldiers from a cave without injuring some female civilians also in the cave.

Exhibit A, Annexed to Complaint

Major, let me read you from the book, from Herbert's book. He says:

Grimshaw suddenly dropped down to his knees and crawled into the cave, whispering softly in Vietnamese. A couple of minutes later, as his men watched open-mouthed, he, Grimshaw, emerged from the cave carrying a baby in his arms. The three Viet Cong soldiers and the two women followed closely behind. It was cool. Nobody asked him why he did it. He never explained. I submitted him for the Silver Star, the country's third-highest combat decoration. He more than deserved it, but he never received it.

GRIMSHAW: I did not do that.

WALLACE: You didn't go in, come out carrying a baby, followed by three VC soldiers and two women?

GRIMSHAW: I did not.

WALLACE: Did he submit you for the Silver Star? Because I don't see your—at that time?

GRIMSHAW: I have no recollection of being submitted for the Silver Star for that incident. There was another incident, in which my first sergeant recommended me.

WALLACE: But not Herbert?

GRIMSHAW: But not Herbert.

WALLACE: In sum, Major, what do you think about Tony Herbert?

(14) GRIMSHAW: You're asking me before or now?

WALLACE: Now.

GRIMSHAW: Having read the stories about me, and only about me—

WALLACE: Right. Things of which you have certain knowledge.

GRIMSHAW: Right. I would say that there is a kernel of truth, there is a nucleus of truth, but unfortunately, I think that he has expanded some of these stories, which may be great reading to the public but not entirely true. And—

Exhibit A, Annexed to Complaint

WALLACE: You seem to say that with—

GRIMSHAW: I say it with resignation—

WALLACE: Reluctance?

GRIMSHAW: —dismay and reluctance. Believe me, if I felt that that was the truth, if I felt that, you know, that was the undeniable truth, I'd stand up in front of everybody and say, "This is the truth." But he's blown it out. He's gone beyond that point and it's a shame.

WALLACE: Do you believe that he was relieved because he wanted to push allegations of war crimes and atrocities? Do you think that's the case?

GRIMSHAW: I don't think that was the cause. I just don't think that was the truth. I feel, somehow, somebody had it in for him, and I don't know who. And it's too bad.

WALLACE: Here we are in the Pentagon. Did anybody here order you to come here and talk to us?

GRIMSHAW: No.

WALLACE: You're your own man?

GRIMSHAW: I'm my own man. I like to think I am. I hope I am.

WALLACE: Jim Grimshaw telephoned Colonel Herbert after we had talked to him. Herbert called us with that news and he claimed that Grimshaw told him that he had spoken with us in the Pentagon only under pressure—that his career was on the line. Herbert told us that was the reason that other officers had also come out against him. When we checked with Grimshaw, he denied telling Herbert that. So to settle the argument, we flew Grimshaw and his wife to New York and had them wait outside listening to our interview with Herbert. When Herbert again intimated that Grimshaw had been pressured by the Pentagon to bad-mouth Herbert, we told Herbert that Grimshaw was there.

(15) HERBERT: Bring him in.

WALLACE: Fine.

Exhibit A, Annexed to Complaint

HERBERT: Good. And ask him the same questions.

WALLACE: You can ask him whatever questions you want to. Here he is right now.

HERBERT: Hello, Jim.

GRIMSHAW: Hi, how are you doing?

HERBERT: Very fine.

WALLACE: Jim, have you heard what's been going on between the Colonel and me?

GRIMSHAW: Yes.

HERBERT: Okay.

GRIMSHAW: We started on line at the base of the hill searching caves. You were with me probably 90% of the time.

HERBERT: Yes, that's why I put in for the Silver Star, yes.

GRIMSHAW: But I'm saying—

WALLACE: Wait a minute. You told me that he didn't put in for the Silver Star for you. [Crosstalk]

HERBERT: —saying I didn't put you in for a medal on that, Jim?

GRIMSHAW: Well, because I don't remember you ever putting me in for a medal.

HERBERT: How about the rest of the things in the book?

WALLACE: Have you read the book? Have you read the book?

GRIMSHAW: Yes, I have read the book.

WALLACE: Do you think it's accurate, by and large?

GRIMSHAW: Well, the incidents—We have to talk about the incidents that I'm personally involved in.

WALLACE: All right. Sure.

GRIMSHAW: So, now we're talking three incidents, when you get right down to it.

WALLACE: And you've told me—

(16) GRIMSHAW: I'm telling you two-thirds, then, are not true.

Exhibit A, Annexed to Complaint

WALLACE: Were you under any pressure, Jim Grimshaw, to—from the Pentagon or from your commanding officer to show up at the Pentagon for an interview?

GRIMSHAW: No.

HERBERT: Now, you told me that—

GRIMSHAW: Absolutely not.

HERBERT: You told me that.

GRIMSHAW: And I wasn't briefed.

WALLACE: Later in the interview, Grimshaw told Herbert he should have checked out his stories with the people whose names appear in the book.

GRIMSHAW: Why didn't you call guys like myself or Hill or some of these guys?

HERBERT: Okay—

GRIMSHAW: You know, you're making us a public figure—

HERBERT: Okay, wait a minute, Jim.

GRIMSHAW: —whether you want—You know, you're trying to do me a very good job and, in a sense, maybe I think it's because of all the problems that occurred and you maybe want to put us in a good light to the American public. But now you've made me a public figure. I can't help it; I have to speak out.

WALLACE: The deeper we got into this investigation, the more we felt that the way in which the media, including CBS News, reacted to Herbert's allegations was almost as interesting as Herbert's story itself. Several reporters did make an effort to check out Herbert's claims, found his case was far from clear-cut and made that obvious in their reports. Many others did not. *The New York Times* did more, probably, to publicize Tony Herbert's story than any other paper. When Herbert passed a lie-detector test on whether or not he had reported war crimes to Franklin, the *Times* gave it big play. But when the Army said that Colonel Franklin, the man Herbert had accused, had also passed a lie-detector test, other papers reported it but there was not a word about it in the *Times*.

Exhibit A, Annexed to Complaint

Attorney Ken Rosenbloom, the former Army lawyer who investigated many of Herbert's charges, says the attitude of the media towards Herbert was understandable.

ROSELNBLoom: Well, he's highly decorated and a respected soldier, and he makes these charges and he gets a lot of newspaper coverage about it. Because of the temper of the times and what the country wanted (17) to hear, perhaps, or because the media was looking for another hero, they tended to accept these allegations uncritically.

WALLACE: *The New York Times* in Vietnam wanted to talk to you and you wouldn't talk to them?

FRANKLIN: No.

WALLACE: Well, you wouldn't talk to them?

FRANKLIN: Well, the logical conclusion to draw from what you're saying, then, is that if you won't talk to the press, then they can say anything they want.

WALLACE: No.

FRANKLIN: But there's still a responsibility to present the truth.

BARNES: During the long investigation on me, the Army's policy was not to put out any statements at all because of prejudice to others involved in the investigation while it was going on. Therefore, the press had no place else to go for information but back to Herbert, where the source was. And I just think that the press did what they could but they weren't given both sides of the stories. Right or wrong, that's—I think that's what happened.

LANDO: Why not make the investigation public, then?

BARNES: Don't ask me. If I was in charge I would, but I'm not in charge.

HERBERT: One of the things I have said from the beginning is that you'll never know for sure. No one will know the whole truth until the Army releases for publication every single document and statement they

Exhibit A, Annexed to Complaint

have, which they have not done unless they've let you read them all. And the second portion is, until they have a full Congressional inquiry to find out is Herbert telling the truth? Is Herbert lying? Is Ross Franklin telling the truth? Is Ross Franklin lying? And lay it all out there for everybody—and I'm sure that's what you're trying to do to some extent tonight and I go along with it.

WALLACE: Okay.

The Army could indeed help resolve the controversy. They could open their files to a public airing. They could make themselves available for questioning about the whole Herbert business. But they won't. I asked former Army Chief of Staff William Westmoreland to talk about it. He refused to be interviewed. I asked General Winant Sidle, the Army's Public Information Chief. He refused, too. Why? We heard two lines of speculation among Pentagon people. One is that the Army doesn't want to help make a martyr of Tony Herbert. And the other is that during their various investigations into Herbert's charges, the Army found so many true stories of war crimes that, irrespective of whether Tony Herbert had reported any of them, the Army just doesn't (18) want to wash that kind of dirty linen in the open. Perhaps the best way to stop all speculation is to do what you heard Anthony Herbert and General Barnes suggest a moment ago: make the Army investigations public.

Exhibit B, Annexed to Complaint

THE
HERBERT
AFFAIR

by Barry Lando

He seemed to be the perfect soldier, a hero in Korea and in Vietnam. Then he was driven out of the Army, his career ruined because he tried to prevent his superiors from concealing war crimes against the Vietnamese. That was the story a television producer persuaded his superiors at CBS should be presented to a nationwide audience. As the producer and his associates began assembling the facts, they found it changing into a very different story, one that left the reporter disillusioned and the hero threatened with deification. The producer here tells how the case unfolded for him, from his first, convincing interviews with Lieutenant Colonel Anthony Herbert, through intensive researching of Herbert's alarming charges against fellow Army officers, to a dramatic confrontation between Herbert and some of those who disputed him on the CBS program, *Sixty Minutes*, shown on February 4 of this year. It is a tangled story, to say the least. One of its lesser anomalies: Herbert's book *Soldier*, now profitably riding the best-seller list, is published by Holt, Rinehart and Winston, which is owned by CBS, the organization that has done the most to attack the book's integrity.

I first met Lieutenant Colonel Anthony Herbert in June 1971. I was an associate producer on the CBS Weekend News, putting together a report about prisoners of war in South Vietnam. I was looking for American veterans with firsthand accounts of brutal treatment meted out to Viet Cong and North Vietnamese POW's. Lieutenant Colonel Herbert seemed a good prospect. A few months earlier, in March, he had publicly charged two Army officers, Brigadier General John W. Barnes and Lieutenant Colonel J. Ross Franklin, with trying to cover up war crimes in Vietnam.

Exhibit B, Annexed to Complaint

When I contacted Herbert by phone in Atlanta, he said he could provide me with just the stories I was looking for. He spoke of cold-blooded murder, of women prisoners having the skin ripped off their breasts by bamboo flails. Casually, Herbert added that he had just received notice from the Army that he had been passed over for promotion for the second time and, thus, would be forced to retire by February, 1972. That in itself was a hell of a story, I told him, and I arranged to film an interview the next day.

When we met, I found his appearance as striking as his rhetoric. Tall, iron-hard, with close-cropped hair, he was a military man all the way and had a chestful of decorations to prove it. The story he told me was the same

*Exhibit B, Annexed to Complaint*

as the one he had told reporters from the beginning. While commanding a battalion of the 173rd Airborne Brigade in Vietnam, Herbert had personally witnessed several war crimes. The most horrifying was the one where Vietnamese police, with an American adviser standing by, had murdered four prisoners. Herbert claimed he came upon the executions just as they were finishing. "There were four dead already and they had a knife at the throat of a woman. Her baby was screaming and clutching at her leg, and this other child was being suffocated. One of the men was shoving its face into the sand with his foot. I told them to stop, but the man holding her just looked at me and slit her throat and dropped her to the sand." Since those killings took place on February 14, 1969, Herbert calls them the "St. Valentine's Day massacre."

According to Herbert, he immediately reported all the atrocity cases he witnessed to Colonel J. Ross Franklin, deputy commander of the 173rd. But, Herbert says, Franklin showed no interest in investigating the charges. "He would say I was getting too soft for war, or I was lying." Herbert said he also reported three of the crimes, including the February 14 slayings, to General John Barnes, commander of the 173rd.

Then, his story continues, he kept badgering Franklin about the investigations until abruptly on April 4, 1969, he was relieved of command. During the fifty-eight days he had led the second battalion, his men had outperformed every other battalion in the brigade. Herbert had been awarded one Silver Star, three Bronze Stars, and had been recommended for the Distinguished Service Cross. "All of a sudden," he says, "Barnes and Franklin decided I was no longer fit to command. It was the war crimes. They wanted to get rid of me."

In Saigon, Herbert appealed his relief from command, a full-scale hearing was held, and his appeal was turned down. Herbert said he attempted to make official reports of war crimes to several top officers but "they all refused

Exhibit B, Annexed to Complaint

to receipt for my charges." Herbert's relief from command was followed by a bad efficiency report, written by Colonel Franklin, accusing him of having "no ambition, integrity, loyalty, or will for self-improvement."

Over the following months, said Herbert, he vainly attempted to have his war crime charges investigated but was continually put off. Finally, in September, 1970, he made formal war crime charges to the Army's Criminal Investigations Division at Fort McPherson, Georgia. Then, when it looked as if the CID, too, was dragging its heels, on March 12, 1971, Herbert formally accused Barnes and Franklin of trying to cover up war crimes.

Though the investigations were still going on, Herbert said, he doubted that Franklin or Barnes would ever be prosecuted. Still, he had hopes for the Army. "I want to make this an honorable army. I want to help correct it. I wouldn't quit under any circumstances."

I was delighted with the interview. Here was one of the Army's own honest-to-God heroes testifying against it. Herbert *was* a hero. He had enlisted at seventeen, won twenty-two medals in some of the bloodiest fighting of the Korean War, then was sent on a promotional world tour by the Army as an example of the finest of U.S. fighting men. He advanced through the ranks of commissioned officers, was a Ranger instructor, a Green Beret, and served in the Middle East and in Europe. His efficiency reports were always outstanding.

Why shouldn't a report be impressed? For months the Army refused to make any comment on Herbert's charges on the grounds that investigations were still going on. With the Pentagon's recent record from the Tonkin Gulf to My Lai, one would be skeptical of an official explanation. I became fascinated with Herbert's story and

Exhibit B, Annexed to Complaint

discussed with him the idea of doing a book about him, or in collaboration with him, though I was in the midst of a job change at CBS. The idea faded away.

In a July, 1971, interview in *Life* magazine, Herbert suggested that war crimes might stop "if we'd hang a couple of senior commanders." In September came his big breakthrough: a lengthy article ("How a Supersoldier Was Fired From His Command") in the Sunday magazine section of the *New York Times*. The piece was written by the *Times* Southern correspondent James T. Wooten. Wooten had covered Herbert since he first made his charges public, and had come to believe fully in the man and most of his claims.

At the time, and for months after, I thought Wooten's article to be an excellent description of Herbert and his case. Unlike several reporters who became suspicious of Herbert soon after they started checking into him, I didn't develop doubts until after several weeks of research. Wooten, who later collaborated with Herbert on his book, *Soldier*, today says he still believes in Herbert. He says he did try to contact General Barnes, but was told that while the Army investigations were under way, Barnes would be unavailable. Franklin had refused to talk with *New York Times* reporters in Vietnam. Wooten says he interviewed none of the other individuals mentioned in *Soldier* to try to check out Herbert's story. As he explains it, the book is not a work of reportage but essentially an autobiography. It ranges from boyhood memories, through Herbert's Korean and cold war experiences, to Vietnam. Although the crucial issue in the book becomes Herbert's war crimes charges, he also accuses the Army of failing to wage the war aggressively, and offers a general critique of the Army on a number of counts.

The *Times* piece led to Herbert's appearance on the Dick Cavett Show, a performance that, according to a delighted Cavett, elicited more viewer response than any other Cavett show. Many politically conservative viewers

Exhibit B, Annexed to Complaint

were just as outraged as liberals were by what the Army seemed to have done to Herbert.

The Herbert case began to arouse Congress. Prodded by Representative Edward Hebert, chairman of the House Armed Services Committee, Secretary of the Army Robert Froehlke announced on October 8 that the Army had decided to reverse itself and toss out the poor efficiency report that had brought Herbert's career to a dismal halt. But that decision, said Froehlke, had nothing to do with Herbert's war crime charges. Many Army officers were outraged and the press had a field day. How could the Army deny Herbert's accusations and at the same time redeem him?

On it went, Herbert involved in one flap after another as the Army assigned him to ridiculous jobs and temporarily blocked a second appearance on the Dick Cavett Show. Finally, in November, 1971, Herbert, claiming continued harassment, announced that he had decided to retire from the Army. There was more outrage from the press. "His retirement," the *Times* editorialized, "will leave him free to continue, as he has pledged, a battle that involves far more than his personal honor: the integrity and effectiveness of the U.S. Army." The Knight newspaper chain weighed in: "Shame on the Army for making a scapegoat of Lt. Col. Anthony Herbert." An article in *The New Republic* said Herbert's resignation "is a disgrace to the Army and a tragedy for the nation. The facts about this matter are by now clear enough."

They really were not. For several months, while the Army was investigating Herbert's accusations, the Army General Counsel ordered those officers involved in the charges to keep silent. That order left many officers, particularly several who had served in the 173rd Airborne Brigade, seething. Herbert, on the other hand, continued to broadcast his charges.

Exhibit B, Annexed to Complaint

When Army investigators finally cleared General Barnes in October, 1971, the Army partially took the wraps off. Reporters who inquired about the case had interviews arranged for them with several officers who had known Herbert in the 173rd and disputed his charges. Many leveled accusations against Herbert, claiming he himself had treated enemy POW's brutally, had damaged at least one civilian hamlet, and had exaggerated or otherwise misrepresented body counts.

The Army also produced an official "fact sheet" disputing Herbert's claims point by point. According to the Army, of the twenty-one allegations made by Herbert to the CID, only seven "had sufficient substance to warrant action or further investigation." Of those, three had already been investigated in Vietnam and one was a case that was not under U.S. jurisdiction. As for the remaining three incidents, including the February 14 killings, the Army claimed there was no evidence, other than Herbert's own word, that he had actually reported those cases to Franklin and Barnes.

Fueled by such information and interviews provided by the Army, several reporters began to write pieces seriously questioning Herbert's claims. Critics included liberals and conservatives: Paul Dean of the *Arizona Republic*, George Crile of the Ridder newspapers, Ken Reich of the *Los Angeles Times*, Peter Braestrup of the *Washington Post*.

When the Pentagon told Mort Kondracke, the Washington reporter for the *Chicago Sun-Times*, that Franklin had passed a lie detector test denying Herbert had ever reported war crimes to him, Kondracke wrote a lengthy article on the Army's claim. But the *New York Times*, which had given considerable space to earlier news that Herbert had passed a lie detector test, made no mention of the Army's report concerning Franklin.

Exhibit B, Annexed to Complaint

COL. FRANKLIN: Tactically, he was the best battalion commander we had. I counseled Herbert several times and once I counseled him on telling the truth or being more exact in what he said. I told him at that time that he could run circles around all the rest of the battalion commanders if he'd just tell the truth.

MIKE WALLACE: Did Colonel Herbert ever report war crimes or atrocities of any nature to you, Colonel Franklin?

FRANKLIN: No.

WALLACE: Never?

FRANKLIN: Never.

WALLACE: Verbally or in writing?

FRANKLIN: In no way, either orally or in writing. I had many conversations with Colonel Herbert, we discussed many things but never war crimes. . . .

*Exhibit B, Annexed to Complaint*

WALLACE: Why would Herbert make such charges if they were just baldly untrue?

FRANKLIN: I would say that he probably holds me more responsible for what happened to him than any other officer.

WALLACE: Being relieved of his command . . . ?

FRANKLIN: Yes. But I can't really imagine the motivation that would lead to such a monumental thing such as this.

WALLACE: Monumental, what's monumental?

FRANKLIN: He has come up with totally fictional charges that as far as I'm concerned, it's been a hoax on the American people.

Sixty Minutes, February 4, 1973

By the end of 1971, the barrage of charges and counter-charges over the Herbert affair had tapered off. The ambivalent conclusion of much of the media was summed up by the title of a piece in the *National Observer*: "Colonel Herbert: A Hero or a Liar."

The reason for that standoff was that most of the Army personnel who had been interviewed and had attacked Herbert were either interested parties such as General Barnes, or men who made damning charges about Herbert's character but had no direct knowledge of the specific charges that Herbert was making. Many other officers, who might have effectively challenged several of Herbert's charges, kept silent either because they had respected him in Vietnam, or because they just did not want to tangle with him. Although many reporters now held strong doubts about Herbert's case, no newspaper, magazine, or network felt compelled to give any investigator the necessary time to probe further and discover who was lying.

Since the first glowing report I had done on Herbert, I had gone to work as a producer for *Sixty Minutes*. One of the first things I did was to push for a story on

Exhibit B, Annexed to Complaint

Herbert. I was still convinced he was telling the truth and he had continued to assure me, and other reports, that as soon as he retired in February, 1972, he would make available more documents to substantiate his case. When I flew to Atlanta in March, 1972, Herbert gave me transcripts of a number of telephone interviews with soldiers who seemed to support his claims. He also put me in touch with other men, giving me name after name of people who, he confidently said, would back his stories. I wanted to believe in Herbert and I now see that I minimized the many discrepancies in his stories. When I showed Mike Wallace some of the information I had gathered on Herbert, including some newspaper reports questioning his story, Wallace looked through the material and announced that he thought Herbert was lying. His comment made me the more intent on proving Herbert was telling the truth.

That turned out to be difficult. When I started contacting the people to whom Herbert had directed me, they were, when pinned down, not able to substantiate Herbert's claims, not even on an off-the-record basis. Even as my doubts grew, Herbert kept furnishing new names, new facts, new explanations. Then, in April, I received a call from a mutual acquaintance who told me Herbert had claimed that the *Sixty Minutes* show on him was being postponed because we were now planning to devote the full hour to him—his was such an important story—rather than the usual fifteen-or twenty-minute segment.

This was only a minor piece of fiction, but it was without foundation. I had personal knowledge of that. Something finally snapped. The inconsistencies, the evasions I had been so eager to overlook, now took on a different hue.

Exhibit B, Annexed to Complaint

In November, 1972, a green-bound uncorrected proof of Herbert's *Soldier* arrived from the publishers. Herbert had shared advance payments of more than \$100,000 with Jim Wooten and their agents for the book. It would be published in a few weeks to almost unanimously favorable reviews.

After being off on other stories, I was back onto Herbert. Over the next few weeks, *Sixty Minutes* researcher Mark Frederiksen and I spoke with more than a hundred and twenty people who had known Herbert throughout his career. Some of them had been mentioned in *Soldier*. One after another refuted many of Herbert's claims.

By the time we were ready to interview Herbert (and others) for the *Sixty Minutes* show, the story had of course turned into something far different from the admiring profile I had thought would result. As soon as Mike Wallace's TV interview with him was filmed, Colonel Herbert turned on me, in his eyes an admirer now turned enemy, and challenged me to deny that I had originally wanted to write a book about him. I was startled; of course that was true, but I had almost forgotten it. In fact, my interest in collaborating with him had ended even before I developed doubts about his story. Herbert kept pressing the point, intimating that all along I had been engaged not in journalism but a vendetta. Angered, I told him that if he went on in this way I would "get" him, that I had recourse to libel action. I came to regret that outburst, because subsequently Colonel Herbert was to cite this confrontation as proof that the CBS television show was a willful plot on my part to discredit him (an impossibility, since others have the last say about the content and purposes of *Sixty Minutes*) and to defile his true story.

The key point in the whole Herbert affair was not whether atrocities had occurred—the Army admitted that some of those described by Herbert did happen—but whether Herbert had actually reported them, and, because

Exhibit B, Annexed to Complaint

he insisted on trying to get them investigated, had had his career ruined by a military establishment intent on covering up war crimes. It was only by claiming to be a martyr that Herbert had gained such national prominence.

But how to prove one way or another whether Herbert had reported war crimes in Vietnam? Each instance he cited was a case of one on one: Herbert's word against Franklin's or Barnes's. It was only on my fifth or sixth reading of the Army's fact sheet that one item stuck out: Herbert, the Army claimed, could not have reported the St. Valentine's Day killings to Franklin on February 14, as he described, because Franklin was on R&R in Hawaii on that date and returned to Vietnam only on February 16, Vietnam time.

Yet in *Soldier* Herbert claims it was Franklin who, on February 14, personally ordered Herbert by field radio to turn his prisoners over to the South Vietnamese police. And, after the murders, Herbert says he spoke again by radio to Franklin, then flew directly back to brigade headquarters to report the crime to Franklin.

"Herbert, you're a goddamned liar," Franklin exploded, according to Herbert's book. Herbert offered to get statements to prove his charge. Franklin, wrote Herbert, "stood up, too, and came right up against me. We were nose to nose. 'No, Herbert, no, you won't do that,' he said. 'I'll get the statements and you, Lieutenant Colonel Herbert, will do exactly what I say. Understand-'"

We double-checked Army records to make certain that the action involving the massacre had indeed taken place on February 14. The Army put us in contact with two officers who claim they had flown with Franklin to Hawaii on February 9 and returned with him to Cam Ranh Bay on February 16. Hotel records in Hawaii showed that both officers had been there at the time they claimed. Still, there was doubt. Both officers

Exhibit B, Annexed to Complaint

admitted to disliking Herbert. We also contacted a former chopper pilot, now a civilian, who claimed he had picked Franklin up at Cam Ranh Bay when he returned, and it was after February 14. Franklin's bill from the Ilikai Hotel in Honolulu had Colonel and Mrs. Franklin registered there from February 7 to February 14. What that meant, said Herbert, was that, since R&R is only five days, Franklin had arrived in Hawaii on the 7th, left on the 12th, which conceivably could have him back at headquarters by the evening of the 14th.

To substantiate this, Herbert claims in *Soldier* that the receipt Franklin produced from the Ilikai Hotel was signed by his wife. "Did Franklin, an airborne colonel, just stand by while his wife handled the payment of their hotel bill? It doesn't add up. You're on R and R and the wife joins you. Five days later you head back to Vietnam and your unit, and your wife, as many of them do, stays on for a day or two."

At our request, Herbert sent us a copy of the hotel "receipt" signed by Mrs. Franklin. A check with the Ilikai showed that what Herbert had was not the receipt, but the *registration form*. That seemed to buttress Franklin's claim that his wife had checked in a couple of days before him.

Colonel Franklin also gave us a cancelled check, dated February 14, 1969, signed by him and made out to the Ilikai for the hotel bill. It could not have been post-dated because it was made out, in handwriting apparently the same as the signature, for the exact amount of the final bill, down to the last penny. Nor could it have been mailed later, since it was cashed the first business day after it was written.

HERBERT (on being shown Franklin's check): *I can probably find you checks, I don't know, I can probably find you—I don't know about this check, I can probably find you—*

Exhibit B, Annexed to Complaint

WALLACE: Wait a minute, you . . .

HERBERT: I see the check . . .

WALLACE: OK.

HERBERT: *I can probably find you a hundred checks that I have either dated for another reason, wrote after the fact, misdated—I don't know. All I know is that I saw Ross Franklin there and talked to him. I know that, I know what I saw, I know what I did. And I stick by it and I still say it. And I swear to it and I've sworn to it under oath. And I'll swear to it again. You know.*

In fact, in *Soldier* Herbert is totally confused on his dates. He says that Franklin was not present when Herbert took over command of the battalion on February 6 because he "had gone on R&R to Hawaii." Two days later by his account, on February 8, "Franklin was back

*Exhibit B, Annexed to Complaint*

behind his desk, and he greeted me warmly." But when Herbert comes to explain Franklin's hotel receipt, he places him in Hawaii from February 7 (February 8 Vietnam time) to February 12.

In *Soldier* Herbert claims there are several people who had seen Franklin in Vietnam on February 14. We asked Herbert for names. Not one of those people, in the Army or out, on the record or off, could back up Herbert's claim.

The key person was Captain Bill Hill, a strapping, blond, former football player from the University of Oklahoma, who had served under Herbert in Vietnam and had had nothing but praise for him. When Herbert and I phoned Hill from Atlanta in March, 1972, Hill said he thought Franklin had been in Vietnam on the fourteenth. Later, when I spoke with Hill by phone, he said he could not be sure he had seen Franklin there. I relayed that information to Herbert. A few hours later still, Herbert called me back, claiming that Hill had phoned him to say he clearly remembered seeing Franklin returning from R&R on the fourteenth, that because he was still in the Army and had a career to worry about, he didn't want to get mixed up in Herbert's case, and that from now on, both Herbert and the press should leave him alone.

I then called Hill and asked if I could meet him; he said, yes, no problem. I wound up spending three hours talking with him at the Oklahoma City airport. Contrary to what Herbert had led me to believe, Hill was completely straightforward.

"Herbert," he said, "is a junior Patton. He was a great battalion commander, but he was in the wrong war. In another war Herbert might have become Chief of Staff, but this war was too political. The thing he loved was fighting, combat, but with pacification, fighting was gone."

Hill denied telling Herbert he was certain he had seen Franklin returning to Vietnam on February 14. He said he had heard Herbert talking about the killings on the

Exhibit B, Annexed to Complaint

battalion radio that day, but did not know who he was talking to. Nor could he be sure that Herbert had in fact reported those killings to brigade.

Hill also vehemently denied telling Herbert he couldn't talk because he was worried about his career. "Herbert has gone off the deep end on a bunch of this. I used to rave about him to my wife. It kills my soul about him because I admired him so much."

A few weeks later, after Hill had had a chance to read *Soldier*, I spoke with him again. "Herbert is the best battalion commander I ever had," he said. "But for some reason he's become a liar, it's all so much garbage."

WALLACE: *Bill Hill, one of your top company commanders, has told us that Herbert is "the best battalion commander I ever had. But for some reason he's become a liar, it's all so much garbage."*

HERBERT: *If he's still in the Army, he will do the same as other officers will do, I'm sure, in order to keep their careers going. These men are not going to destroy themselves.*

WALLACE: *In other words, he has simply chickened out and is going along with the Army line against Herbert?*

HERBERT: *I don't know. I don't know that he said it. You're telling me he said it. I'm sure he did say it if you say he did. I'm telling you, if Bill Hill feels I'm lying, he's entitled to that opinion, right?*

Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outer office when Herbert reported to Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew

Exhibit B, Annexed to Complaint

to Columbus, Georgia, to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? I asked. He had no sons.

After talking with scores of men who had known Herbert in Vietnam, many of whom still admire him, we could not find a single person who believed that Herbert had been relieved for trying to get war crimes investigated. Most gave other reasons, from personality conflict between Franklin and Herbert, to Barnes's claims that Herbert could not be trusted, could not get along with the brigade staff, or might be using too much firepower against civilian-populated areas.

There is an inexplicable gap of almost eighteen months between the time Herbert was relieved, April 5, 1969, and the day he formally brought his war crime charges to the Army CID, September 28, 1970. Herbert claims he was constantly trying to get his charges investigated during that period, but he has no written evidence whatsoever to back up his claim. We contacted all the Army officers Herbert said he had tried to report war crimes to while in Saigon. Most recalled talking with Herbert about his request for a formal inquiry into his relief from command. But all, including Colonel John Douglas, the Army's top lawyer and judge in Vietnam, denied that Herbert ever mentioned war crimes.

DOUGLAS: *I can't believe that if there were war crimes involved and we were trying to stay out of it—as indicated by this passage [from Soldier] you just read to me—that we'd then recommend a full-scale investigation [into Herbert's relief], which we did.*

WALLACE (to the audience): *Douglas said that he was irritated by the implication that he wouldn't bring charges against a general.*

DOUGLAS: *And I am annoyed, I'm hurt. I feel that this is an indication that I'm not of strong enough character to be either a lawyer or an Army officer, and I happen to be both, and I'm proud of being both.*

Exhibit B, Annexed to Complaint

WALLACE: *But why haven't you said this up to now?*
 DOUGLAS: *Nobody asked me.*

Nowhere in the entire one hundred and sixty pages of transcript of the official inquiry into Herbert's relief is there any mention by Herbert of war crimes. Why? Herbert first claimed that Army regulations prevented him from including war crime charges in his appeal. Army regulations say nothing of the kind. Herbert then claimed he did try to raise the charges during his appeal, but was advised not to by General Joseph Russ, the presiding officer. General Russ denies this. So do the court recorder and the military lawyer assigned to Herbert's case.

According to Herbert, during the several months he spent at Fort Leavenworth, Kansas, after leaving Vietnam, he worked ceaselessly, spent \$8000 of his own money, getting statements, contacting witnesses, all to buttress his war crimes case. Herbert does have several statements from officers praising him as a commander, which he used to appeal the damaging efficiency report in his record; but there is not a word relating to war crimes.

It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York Times piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. They kept recommending that I'd better make sure those things I'd seen were investigated," he said, "It made sense to me to try to follow the book on this and clear myself."

HERBERT: *I'm not going to say we have documents or not. I can say we have statements, sworn statements and testimony that will prove that I have reported war crimes in Vietnam.*

Exhibit B, Annexed to Complaint

WALLACE: *Have you published them in your book?*
 HERBERT: *I don't think so.*

WALLACE: *Why?*
 HERBERT: *I had no reason to, it was already in the paper, other things. I don't know why. I have lawyers just like you have lawyers. We didn't put everything out that we have.*

Herbert claims that the Army's investigations into Barnes and Franklin were a whitewash. Since the Army, citing legal precedent, refused to release the investigations, there was no way to be absolutely certain Herbert was not correct.

Then Herbert put me in contact with Ken Rosenblum. As a captain in the Judge Advocate General's Corps, Rosenblum had done the nuts-and-bolts work during the Army's investigation of General Barnes. He had access to much of the material in the Franklin investigation as well.

"You should talk to him," Herbert told me. He added that he had already called Rosenblum on my behalf and that Rosenblum was now out of the Army and could talk freely. I was shaken. After all I had found out, I thought it inconceivable that Herbert was telling the truth. But if he was not, why put me in contact with Rosenblum?

I flew to Islip, Long Island, to talk with Rosenblum. He is a quiet-spoken, young assistant district attorney, and he assured me, quite calmly, that there had been no cover-up. "We spent hours taking statements from Herbert," he said. "And for several months I was Herbert's telephone buddy. He kept calling me up with additional suggestions of people to talk to. We went all over the country following his leads, chasing people down, but when it came to the critical facts, the people he had told us would support his claims just did not. You know, I think he has reached the point where he really believes

Exhibit B, Annexed to Complaint

his charges." Rosenblum is only one of several people, including Colonel Franklin, who deny Herbert's charges but feel that Herbert himself *believes* he is telling the truth. How else explain Herbert's volunteering the names of so



many individuals, such as Rosenblum, who rather than confirm his story actually undermine it?

Most of *Soldier* is a mélange, a kaleidoscope of truth, half-truth, and fabrication. A few examples:

—According to *Soldier*, in 1968, shortly after Herbert had come to the 173rd, three Americans were found staked out, tortured to death by North Vietnamese. A few days later three NVA soldiers were spotted staked out on the same spot. A note pinned to one of the bodies explained that the three had been executed by the NVA themselves as punishment for having tortured the Americans. According to Herbert, Major Walt Werner reported the inci-

Exhibit B, Annexed to Complaint

dent exactly as it had occurred, but his battalion commander refused to accept it. "What the hell was Werner trying to do, he asked, credit the North Vietnamese Army with humane actions! . . . [Werner] was encouraged to alter his report. He refused—and that took guts." That, suggested Herbert, was the reason Werner had not received an assignment he had wanted in Vietnam.

"Somebody's imagination is running a little wild," Werner told me. "An incident like that did happen, but it was two years earlier at Khe Sanh. It was reported by myself and others without any problem. It had nothing to do with my not getting the job I wanted."

—Master Sergeant Roy Bumgarner, who served under Herbert, was charged with having murdered three Vietnamese peasants in cold blood, blown off their heads with a grenade, then produced several Chinese weapons which he claimed he found on their bodies to substantiate his story that they were enemy soldiers. Herbert ridicules the charges, and depicts himself defending a hapless Bumgarner's constitutional rights against badgering military investigators.

Herbert ends his account without mentioning that Bumgarner was ultimately court-martialed and found guilty on the basis of overwhelming evidence.

—Captain Jim Grimshaw, who served under Herbert in Vietnam, supposedly tried to flush some Viet Cong soldiers from a cave where they were hiding, without injuring some female civilians and children also in the cave. To do that, Grimshaw heroically crawled into the cave, emerged a couple of minutes later "carrying a baby in his arms. . . . The three Viet Cong soldiers and the two women followed closely behind. It was cool. Nobody asked him why he did it, he never explained. I submitted him for the Silver Star. . . . But he never received it."

Exhibit B, Annexed to Complaint

When I phoned Grimshaw to ask him about that and other stories involving him, he denied that the incident had ever occurred. Nor, he said, had Herbert ever submitted him for a Silver Star. A few days later, I was surprised to receive a long letter from Grimshaw: "I thought Herbert was a fine commander and man," he wrote, "and I would do what I could to help him—anything, except lie."

—Even the General's duck. According to Herbert, General Barnes kept a duck as a mascot, sometimes ordering his men, only half-jokingly, to salute it. One night in a rage, Herbert supposedly killed it and had duck sandwiches a few hours later with Sergeant Major Bittorie.

Bittorie denies this, and the general who succeeded Barnes inherited the duck long after Herbert had left. When presented with this denial, Herbert first claimed that he had not meant to name Bittorie but another sergeant, and now denies that Bittorie's name was ever in the book regarding the duck incident. But it is—page 400.

We checked some tales in *Soldier* about Herbert's exploits prior to Vietnam. One after another, the stories he told were refuted by men who, usually, had no axes to grind.

Other yarns describe Herbert's James Bond-like activity in the Middle East—serving as a finger man for political assassins, and aborting a zany extortion-espionage plot involving British and American girls from sensitive posts in the Middle East who were photographed in compromising positions while bedded down in the Dominican Republic. All those stories met with incredulous denials by officials who had served with or over Herbert during that time.

Herbert recounts how, while serving in Europe with U.S. Rangers, he arranged for his men to receive special training from the famed Nazi commando, Otto Skorzeny, who had set up a "School of Commando Tactics" in the

Exhibit B, Annexed to Complaint

mountains of Spain. Skorzeny, after reading Herbert's account, says "everything is invented from A-Z."

One of the few reviewers to question Herbert's credibility discovered inaccuracies in his account of Korean experiences. S. L. A. Marshall wrote in the *National Review*: "As for where the truth lies in this incident, and the reliability of Mr. Herbert's testament, if his recollection of what happened around Ankhe and Tuyhoa in Vietnam is no better than his recall of experience in Korea, the grading should be zero minus. Having been there at the same time, moving through the same scenes with the same outfits, I say that he dilates expansively on things that never happened."

Discrepancies had also turned up in Herbert's first book, *Conquest to Nowhere*, about the Korean War. Its co-author, Robert Niemann, had tried to check out some of Herbert's stories.

After answering some of Niemann's queries, a man known in the book as "Bernstein" wrote: "When I saw 'Herb' over the New Year I was appalled by how bad his memory has grown. He was very mixed up on many facts and points of information. I would advise you to check carefully any facts used in promotional work. Those things can backfire. In all confidence I knew 'Herb' better than anyone in the company and he was always prone to exaggeration and looseness in this way. I say this as a friend who understands him and not in the least way to deprecate him. He's just that way."

When we tracked down "Bernstein" in New York, he confirmed having written the letter, on January 18, 1954.

In January, 1973, Herbert made yet another appearance, his third, on the Dick Cavett Show. It was like old home week. No sooner had Herbert sat down than he unveiled his newest claim; classified Pentagon documents, filched for him by a friend at the Pentagon, demonstrated that

Exhibit B, Annexed to Complaint

the Army had been out to ruin him by any available means. "It says in effect," he told Cavett, "that once the publicity dies down, we will get this guy."

In fact, the documents say nothing of the kind. Herbert had sent us a set weeks before. If anything, they show that the Army had decided to bring no legal or administrative action against Herbert, although some officers felt action was justified.

Cavett did not ask Herbert to produce the documents. In a follow-up story on those documents, a New York *Times* reporter included in his tentative lead the fact that "a careful examination of the copies of the documents obtained by the New York *Times* also reveals them to be less dramatic than Colonel Herbert's description of them on the Dick Cavett Show of January 23, which illuminates the ambiguities that have permeated the Herbert case for three years." An editor ordered that lead dropped on the grounds that it was opinion, not fact.

Our *Sixty Minutes* show on Herbert was aired in February. What was most surprising in the wake of it was the reaction of Holt, Rinehart and Winston, the publishers of *Soldier* (and, incidentally, a company owned by CBS). There was no reaction. Without divulging the tone of our report, I had spoken with Donald Hutter, the editor at Holt who was handling *Soldier*, a few days before we went on the air.

"Essentially," he had said, "this is a book about the military profession and a man dedicated to trying to awaken us to the corruption of that profession. I am privileged to be part of it."

After our show had been broadcast, I had thought that Holt would try to contact us, if only as a precaution against a libel suit. How serious were the flaws in Herbert's story? What else did we have on him? The book, after all, is replete with potentially actionable attacks against several military officers. But there was no call from Holt.

Exhibit B, Annexed to Complaint

When I was preparing this piece, I called Holt. There were a number of pictures in the book and I thought it very likely that at least three of them were not what the captions purported. When I told Hutter why I was doubtful, he admitted: "I can't say I examined them that carefully. Tony gave them to us and they seem to be what he said they were. But I can't say they are categorically, myself.

"There is no question in our mind about the substantial validity of Tony's story."

The views of Aaron Asher, Holt vice-president, are much the same. "We are only responsible for a general feeling of accuracy," he says, "not to check out every detail."

What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.

The Army has not released the contents of its investigation into the Herbert affair. The Army is not compelled to do so. There is no recent precedent for such disclosure, though it would presumably go a long way toward clearing the air. The Army, however, may well resist publishing the information because it would include many accounts of atrocities that would further damage the Army's own reputation.

It is important not to let the vagaries of the Herbert affair obscure the fact that atrocities did occur, before Herbert's eyes and the eyes of countless others. Indeed, the argument can be made that Herbert, whatever his distortions and inventions, is to be thanked for keeping the nation's eyes on the war crimes issue. But I am not comfortable with that argument, because it forgets the responsibility of the press. The press, which long had been

Exhibit B, Annexed to Complaint

negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we bought ourselves a martyr with feet of clay. □

**Answer of Mike Wallace and Columbia Broadcasting System**

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[TITLE OMITTED IN PRINTING.]

Defendants Mike Wallace (hereinafter "Wallace") and Columbia Broadcasting System, Inc. (hereinafter "CBS") by Coudert Brothers, their attorneys, in answer to plaintiff's complaint respectfully allege:

AS AND FOR A FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND DEFENSE
(Answering the First Count)

2. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "1" and "2" of plaintiff's complaint; except, with respect to paragraph "2" thereof, admit that at some time prior to his retirement, plaintiff brought charges against his immediate superior officers relative to a cover-up of atrocities during the Vietnam War.

3. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "3" of plaintiff's complaint; except admit that, as an employee of CBS, Lando served as the producer of a segment [entitled "The Selling of Colonel Herbert" (hereinafter "Selling")] of the CBS television program entitled "60 Minutes", said program having been broadcast over the CBS Television Network on February 4, 1973 from the City, County and State of New York.

Answer of Mike Wallace and Columbia Broadcasting System

4. Admit each and every allegation contained in paragraphs "4" and "5" of plaintiff's complaint.
5. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "6" of plaintiff's complaint.
6. Deny each and every allegation contained in paragraph "7" of plaintiff's complaint; except admit that plaintiff enlisted in the United States Army at 17 years of age, rose in the ranks and toured the United States and foreign countries for or on behalf of the United States Army, and enjoyed a good reputation for courage under fire, but deny knowledge or information sufficient to form a belief as to the allegation that plaintiff was selected by General M. B. Ridgeway in November, 1951 as the outstanding American soldier in Korea.
7. Upon information and belief, deny each and every allegation contained in paragraph "8" of plaintiff's complaint; except admit that plaintiff was relieved of command by his superior Brigade officer and that a poor efficiency rating placed against his record was subsequently removed by the Secretary of the Army.
8. Deny each and every allegation contained in paragraph "9" of plaintiff's complaint.
9. Deny each and every allegation contained in paragraph "10" of plaintiff's complaint; except admit that in September of 1970 plaintiff's charges of war crimes were made to the Third Army Inspector General at Fort McPherson, that said charges were referred to the U.S. Army Criminal Investigation Division (USACIDA) and that in or about March of 1971, plaintiff filed formal charges against General Barnes and Colonel Franklin.

Answer of Mike Wallace and Columbia Broadcasting System

10. Deny each and every allegation contained in paragraph "11" of plaintiff's complaint; except admit that in or about March of 1971, it became known beyond the military and Department of Defense that plaintiff was charging war crimes and command cover-up and that said charges and knowledge of said charges became a matter of wide public interest.
11. Upon information and belief, deny each and every allegation contained in paragraphs "12" and "13" of plaintiff's complaint; except admit upon information and belief that Barry Lando (hereinafter "Lando") first met plaintiff at Natural Bridge, Virginia on or about July 1, 1971.
12. Deny each and every allegation contained in paragraph "14" of plaintiff's complaint.
13. Deny each and every allegation contained in paragraph "15" of plaintiff's complaint; except admit that, at the time of the production, presentation and broadcast of "Selling" defendants Lando and Wallace were employees of defendant CBS.
14. Deny each and every allegation contained in paragraphs "16" of plaintiff's complaint; except insofar as paragraph "3" of this answer contains specific admissions and further admit that the program "60 Minutes" was broadcast to millions of viewers.
15. Deny each and every allegation contained in paragraph "17" of plaintiff's complaint.
16. Deny each and every allegation contained in paragraph "18" of plaintiff's complaint including its subparagraphs; except admit that annexed to the plaintiff's complaint as Exhibit "A" is an audio transcript of "Selling".
17. Deny each and every allegation contained in paragraphs "19", "20", "21" and "23" of plaintiff's complaint.

Answer of Mike Wallace and Columbia Broadcasting System

18. Deny each and every allegation contained in paragraph "22" of plaintiff's complaint.
19. Deny each and every allegation contained in paragraph "24" of plaintiff's complaint; except admit that statements attributed to Captain Heintz do appear in the audio transcript annexed to plaintiff's complaint as Exhibit "A".
20. Deny each and every allegation contained in paragraph "25" of plaintiff's complaint; except admit that "Selling" was presented for approximately thirty-five minutes and that, except for that portion of the interview during which both plaintiff and Major James Grimshaw were present, plaintiff was interviewed in New York without the presence of any other person who appeared on the program.
21. Deny each and every allegation contained in paragraph "26" of plaintiff's complaint including the subparagraphs thereof; except admit that, in the presence of the executive producer of "60 Minutes", plaintiff accused defendant Lando of producing "Selling" out of spite because defendant Lando had not written the book on plaintiff; and defendant Lando responded thereto by stating that if plaintiff continued to make this kind of accusation, defendant Lando would "get" plaintiff by suing him for libel.
22. Deny each and every allegation contained in paragraphs "27" and "28" of plaintiff's complaint.
23. Deny each and every allegation contained in paragraph "29" including the subparagraphs thereof; except as to subparagraph (a), admit that an interview with Major James Grimshaw was conducted in the Pentagon; and as to subparagraph (g) admit that "Selling" reported that numerous persons interviewed supported plaintiff's leadership as a Battalion Commander and some denied that plaintiff was a brutal or a ruthless killer.

Answer of Mike Wallace and Columbia Broadcasting System

24. Deny each and every allegation contained in paragraphs "30", "31", "32", "33" and "34" of plaintiff's complaint.

AS AND FOR A THIRD DEFENSE

25. The matter complained of was based on information communicated to defendants by reliable persons and from reliable sources and was believed by defendants to be true and a fair and accurate report of public and official proceedings. Said matter was published by defendants in good faith, without malice.

AS AND FOR A FOURTH DEFENSE

26. The publication charged to be defamatory is privileged under the First and Fourteenth Amendments to the Constitution of the United States and maintenance of this action would therefore violate the rights of the defendants under the United States Constitution.

WHEREFORE, defendants, Mike Wallace and Columbia Broadcasting System, Inc. pray for judgment dismissing plaintiff's complaint, together with costs and disbursements of this action.

Yours, etc.

COUDERT BROTHERS
By s/s
A Member of the Firm
Attorneys for Defendants Mike Wallace
and Columbia Broadcasting System,
Inc.

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Answer of Barry Lando

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[TITLE OMITTED IN PRINTING.]

Defendant, BARRY LANDO, by RICHARD G. GREEN, his attorney, for his answer to the complaint herein:

- 1) Denies each and every allegation contained in paragraphs 9, 13, 17, 19, 20, 23, 27, 28, 30, 31, 33, 34, 38, 39, 51, 52 and 53.
- 2) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 48 and 49.
- 3) Denies each and every allegation contained in paragraph 1, except the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars.
- 4) With respect to paragraph 2, denies knowledge or information sufficient to form a belief as to when plaintiff caused to be written a book entitled "SOLDIER."
- 5) Denies each and every allegation contained in paragraph 3, except that at all times hereinafter mentioned defendant Lando is and was an employee of defendant COLUMBIA BROADCASTING SYSTEM, INC. (misnamed in paragraph 3 of the complaint COLUMBIA BROADCASTING SYSTEMS, INC.) in which capacity he produced a segment, entitled "THE SELLING OF COL. HERBERT" (hereinafter "Selling") of a program entitled "SIXTY MINUTES," which was broadcast on the CBS Television Network from its studio in New York City on February 4, 1973, and who, subsequent thereto, wrote and submitted to ATLANTIC MONTHLY COMPANY (hereinafter "Company") an article entitled "THE

Answer of Barry Lando

HERBERT AFFAIR" (hereinafter "Affair") which was published in the May, 1973 issue of "THE ATLANTIC MONTHLY" magazine (hereinafter "Monthly").

- 6) Denies each and every allegation contained in paragraph 7 except plaintiff enlisted in the United States Army at 17 years of age, rose in the ranks and toured the United States and foreign countries representing the United States Army and had a good reputation for courage under fire, and defendant Lando denies knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff was selected by Gen. Matthew B. Ridgeway in November, 1951 as the outstanding American soldier in Korea.
- 7) Denies each and every allegation contained in paragraph 8 except plaintiff was relieved of command by his superior brigade officers and a poor efficiency rating was placed against his record which was subsequently removed by the Secretary of the Army upon review.
- 8) Denies each and every allegation contained in paragraph 10 except in September, 1970 plaintiff made charges to the Third Army Inspector General at Fort McPherson, and said charges were subsequently referred to the U. S. Army Criminal Investigation Division Agency (USACIDA), and in or about March of 1971, plaintiff filed formal charges against General Barnes and Colonel Franklin.
- 9) Denies each and every allegation contained in paragraph 11 except in or about March, 1971 it became known beyond the military and Department of Defense and it became a matter of wide public interest that plaintiff was charging war crimes and command cover-up.
- 10) Denies each and every allegation contained in paragraph 12 except defendant Lando first met plaintiff at Natural Bridge, Virginia in or about July 1, 1971.
- 11) Denies each and every allegation contained in paragraph 14.

Answer of Barry Lando

12) Denies each and every allegation contained in paragraph 15 except defendants Lando and Wallace are and at the time of the production, presentation and broadcast of "Selling", were employees of defendant CBS.

13) Denies each and every allegation contained in paragraph 16 except "Selling" was produced by defendant Lando and was broadcast by defendant CBS on February 4, 1973 to millions of viewers.

14) Denies each and every allegation contained in paragraph 18 including all its subparagraphs except, an audio transcript of "Selling" as broadcast on CBS is annexed to the complaint as Exhibit "A".

15) Denies each and every allegation contained in paragraph 21.

16) Denies each and every allegation contained in paragraph 22.

17) Denies each and every allegation contained in paragraph 24 except defendant Lando interviewed Captain Richard Heintz, and statements attributed to Captain Heintz appeared in "Selling".

18) Denies each and every allegation contained in paragraph 25 except "Selling" was presented for approximately 35 minutes of air time and that except for the portion of the interview during which both plaintiff and Major James Grimshaw were present, plaintiff was interviewed in New York by defendant Wallace without the presence of any other person who appeared on the program.

19) Denies each and every allegation contained in paragraph 26 including all its subparagraphs, except, as to subparagraph (e) defendant Lando, after the interview and outside the interview room, responded to plaintiff's accusation that defendant Lando produced the program out of spite because defendant Lando was not writing

Answer of Barry Lando

the book on plaintiff by stating that if plaintiff continued to make this kind of accusation, defendant Lando would "get" plaintiff by suing him for libel; and as to subparagraph (f) the executive producer of SIXTY MINUTES was present at said interview.

20) Denies each and every allegation contained in paragraph 29 including all its subparagraphs, except, as to subparagraph (a) an interview of Major James Grimshaw was conducted in the Pentagon, in a smaller, less comfortable studio, than the environment of plaintiff's interview, with Army personnel in attendance; and as to subparagraph (g) "Selling" reported that numerous persons interviewed supported plaintiff's leadership as a battalion commander and some denied that plaintiff was a brutal or a ruthless killer.

21) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 32 except denies defendant Lando's activities were malicious.

22) Repeats the answers hereinbefore made to each and every allegation repeated and realleged in paragraph 35 of the complaint.

23) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 36 except "Monthly" is a magazine of national circulation.

24) Denies each and every allegation contained in paragraph 37 except "Affair" was distributed by defendant "Company" in the May, 1973 issue of "Monthly", Volume 231, Number 5.

25) Denies each and every allegation contained in paragraph 40 except a copy of "Affair" as published in "Monthly" is annexed to the complaint as Exhibit "B" and defendant Lando wrote the article "Affair" except for the introductory first paragraph and defendant Lando did not draw or select the illustrations for the article.

Answer of Barry Lando

26) Denies each and every allegation contained in paragraph 41 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 75, Exhibit "D" of the complaint, hereinafter "Ex. B."), but the quotation is not a complete paragraph, as indicated in the complaint, but is a part of a paragraph which reads in full:

When Army investigators finally cleared General Barnes in October, 1971, the Army partially took the wraps off. Reporters who inquired about the case had interviews arranged for them with several officers who had known Herbert in the 173rd and disputed his charges. Many leveled accusations against Herbert, claiming he himself had treated enemy POW's brutally, had damaged at least one civilian hamlet, and had exaggerated or otherwise misrepresented body counts.

(Emphasis above and hereinafter added to show material omitted from quotation in complaint)

; and denies defendant Lando maliciously omitted any facts in "Affair" and denies knowledge or information sufficient to form a belief as to the remainder of subparagraph (a); as to subparagraph (b) the words quoted were used in "Affair" (p. 76, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is extracted from the middle of a paragraph which reads in full:

The reason for that standoff was that most of the Army personnel who had been interviewed and had attacked Herbert were either interested parties such as General Barnes, or men who made damning charges about Herbert's character but had no direct knowledge of the specific charges that Herbert was making. Many other officers, who might have effectively challenged several of Herbert's charges,

Answer of Barry Lando

kept silent, either because they had respected him in Vietnam, or because they just did not want to tangle with him. *Although many reporters now held strong doubts about Herbert's case, no newspaper, magazine, or network felt compelled to give any investigator the necessary time to probe further and discover who was lying.*

; as to subparagraph (c) the words quoted were used in "Affair" (p. 79, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is only the beginning of the paragraph which reads in full:

It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York Times piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd seen were investigated,' he said. 'It made sense to me to try to follow the book on this and clear myself.'

; and as to subparagraph (d) the words quoted were used in "Affair" (p. 80, Ex. B) as quoted.

27) Denies each and every allegation contained in paragraph 42 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair", (p. 25, Ex. B) as quoted, and denies knowledge or information sufficient to form a belief as to whether the Army refused to permit Franklin and Barnes to be examined by the same expert examiner who had tested plaintiff; as

Answer of Barry Lando

to subparagraph (c) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (d) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; and as to subparagraph (e) the words quoted were used in "Affair" (p. 77, Ex. B), but the quotation is not a complete paragraph as indicated in the complaint, but comes from the middle of a longer paragraph which reads in full:

We double-checked Army records to make certain that the action involving the massacre had indeed taken place on February 14. The Army put us in contact with two officers who claimed they had flown with Franklin to Hawaii on February 9 and returned with him to Cam Ranh Bay on February 16. Hotel records in Hawaii showed that both officers had been there at the time they claimed. Still, there was doubt. Both officers admitted to disliking Herbert. We also contacted a former chopper pilot, now a civilian, who claimed he had picked Franklin up at Cam Ranh Bay when he returned, and it was after February 14. Franklin's bill from the Ilikai Hotel in Honolulu had Colonel and Mrs. Franklin registered there from February 7 to February 14. What that meant, said Herbert, was that, since RdR is only five days, Franklin had arrived in Hawaii on the 7th, left on the 12th, which conceivably could have him back at headquarters by the evening of the 14th.

28) Denies each and every allegation contained in paragraph 43 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 80, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, inasmuch as the paragraph quoted ends with the phrase "A few examples:" and then continues for a column and a half to cite examples; as

Answer of Barry Lando

to subparagraph (b) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (d) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (e) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (f) the words quoted were used in "Affair" (p. 76 Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is from a paragraph which reads in full:

After being off on other stories, I was back onto Herbert. Over the next few weeks, SIXTY MINUTES researcher Mark Frederiksen and I spoke with more than a hundred and twenty people who had known Herbert throughout his career. Some of them had been mentioned in SOLDIER. One after another refuted many of Herbert's claims.

; as to subparagraph (g) the words quoted were used in "Affair" (p. 76, Ex. B), but the quotation is taken out of context, the first six words coming from one paragraph, the balance coming from the succeeding paragraph, and the two paragraphs read in full:

Since the first glowing report I had done on Herbert, I had gone to work as a producer for SIXTY MINUTES. One of the first things I did was to push for a story on Herbert. I was still convinced he was telling the truth and he had continued to assure me, and other reporters, that as soon as he retired in February, 1972, he would make available more documents to substantiate his case. When I flew to Atlanta in March, 1972, Herbert gave me transcripts of a number of telephone interviews with soldiers who seemed to support his claims. He also put me in touch with other men, giving me name after name of people who, he confidently said, would back his stories. I WANTED to believe in

Answer of Barry Lando

Herbert and now I see that I minimized the many discrepancies in his stories. When I showed Mike Wallace some of the information I had gathered on Herbert, including some newspaper reports questioning his story, Wallace looked through the material and announced that he thought Herbert was lying. His comment made me the more intent on proving Herbert was telling the truth.

That turned out to be difficult. When I started contacting the people to whom Herbert had directed me, they were, when pinned down, not able to substantiate Herbert's claims, not even on an off-the-record basis. Even as my doubts grew, Herbert kept furnishing new names, new facts, new explanations. Then, in April, I received a call from a mutual acquaintance who told me Herbert had claimed that the SIXTY MINUTES show on him was being postponed because we were now planning to devote the full hour to him—his was such an important story—rather than the usual fifteen-or-twenty-minute segment.

29) Denies each and every allegation contained in paragraph 44 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 78, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph, which reads in full:

There is an inexplicable gap of almost eighteen months between the time Herbert was relieved, April 5, 1969, and the day he formally brought his war crime charges to the Army CID, September 28, 1970. Herbert claims he was constantly trying to get his charges investigated during that period, but he has no written evidence whatsoever to back up his claim.

Answer of Barry Lando

We contacted all the Army officers Herbert said he had tried to report war crimes to while in Saigon. Most recalled talking with Herbert about his request for a formal inquiry into his relief from command. But all, including Colonel John Douglas, the Army's top lawyer and judge in Vietnam, denied that Herbert ever mentioned war crimes.

; as to subparagraph (b) the words quoted were used in "Affair" (p. 79, Ex. B), what appears to be a second paragraph in the complaint is not a paragraph but is part of the first paragraph, and the last paragraph is incomplete, the complete paragraphs reading in full:

According to Herbert, during the several months he spent at Fort Leavenworth, Kansas, after leaving Vietnam, he worked ceaselessly, spent \$8,000 of his own money, getting statements, contacting witnesses, all to buttress his war crimes case. Herbert does have several statements from officers praising him as a commander, which he used to appeal the damaging efficiency report in his record; but there is not a word relating to war crimes.

It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York TIMES piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd seen were investigated,' he said: 'It made sense to me to try to follow the book on this and clear myself.'"

Answer of Barry Lando

; as to subparagraph (e) the words quoted were used in "Affair" (p. 79, Ex. B) but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph which reads in full:

Nowhere in the entire one hundred and sixty pages of transcript of the official inquiry into Herbert's relief is there any mention by Herbert of war crimes. Why? Herbert first claimed that Army regulations prevented him from including war crime charges in his appeal. Army regulations say nothing of the kind. *Herbert then claimed he did try to raise the charges during his appeal, but was advised not to by General Joseph Russ, the presiding officer. General Russ denies this. So do the court recorder and the military lawyer assigned to Herbert's case.*

; and as to subparagraph (e) the words quoted were used in "Affair" (p. 75, Ex. B) but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph which reads in full:

The Army also produced an official 'fact sheet' disputing Herbert's claims point by point. According to the Army, of the twenty-one allegations made by Herbert to the CID, only seven 'had sufficient substance to warrant action or further investigation.' Of those, three had already been investigated in Vietnam and one was a case that was not under U.S. jurisdiction. *As for the remaining three incidents, including the February 14 killings, the Army claimed there was no evidence other than Herbert's own word, that he had actually reported those cases to Franklin and Barnes.*

Answer of Barry Lando

30) Denies each and every allegation contained in paragraph 45 except, the words quoted were used in "Affair" (p. 81, Ex. B) but the quotation that appears to follow the first quoted paragraph does not follow it, said quotation is not a complete paragraph and the complete paragraphs read in full:

What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.

The Army has not released the contents of its investigation into the Herbert affair. The Army is not compelled to do so. There is no recent precedent for such disclosure, though it would presumably go a long way toward clearing the air. The Army, however, may well resist publishing the information because it would include many accounts of atrocities that would further damage the Army's own reputation.

It is important not to let the vagaries of the Herbert affair obscure the fact that atrocities did occur before Herbert's eyes and the eyes of countless others. Indeed, the argument can be made that Herbert, whatever his distortions and inventions, is to be thanked for keeping the nation's eyes on the war crimes issue. But I am not comfortable with that argument, because it gets the responsibility of the press. The press, which long had been negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we bought ourselves a martyr with feet of clay.

Answer of Barry Lando

31) Denies each and every allegation contained in paragraph 46 except the words quoted in subparagraphs (a), (b) and (c) appear in "Affair" (pp. 76, 73 and 77, Ex. B) as quoted; and the words quoted in subparagraph (d) appear in "Affair" (p. 76, Ex. B), but what appears to be the first quoted paragraph is not the beginning of that paragraph, and what appears to be a second quoted paragraph is in fact part of the first quoted paragraph which reads in full:

By the time we were ready to interview Herbert (and others) for the Sixty Minutes show, the story had of course turned into something far different from the admiring profile I had thought would result. As soon as Mike Wallace's TV interview with him was filmed, Colonel Herbert turned on me, in his eyes an admirer now turned enemy, and challenged me to deny that I had originally wanted to write a book about him. I was startled; of course that was true, but I had almost forgotten it. In fact, my interest in collaborating with him had ended even before I developed doubts about his story. Herbert kept pressing the point, intimating that all along I had been engaged not in journalism, but a vendetta. Angered, I told him that if he went on in this way I would "get" him, that I had recourse to libel action. I came to regret that outburst, because subsequently Colonel Herbert was to cite this confrontation as proof that the CBS television show was a willful plot on my part to discredit him (an impossibility, since others have the last say about the content and purposes of SIXTY MINUTES) and to defile his true story.

32) Denies that the statements referred to in paragraph 47 were false and defamatory, and denies knowledge or information sufficient to form a belief as to each and every

Answer of Barry Lando

other allegation contained in paragraph 47, except admits "Company" published the introduction to "Affair" in the words set forth on the first page of Exhibit B.

33) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 50 except denies "Affair" was false and malicious and contained malicious content and intent.

AS AND FOR A FIRST COMPLETE DEFENSE TO EACH CAUSE OF ACTION

34) The complaint fails to state a cause of action upon which relief can be granted.

AS AND FOR A SECOND COMPLETE DEFENSE TO EACH CAUSE OF ACTION

35) The publications charged to be defamatory are privileged under the First and Fourteenth Amendments to the Constitution of the United States and maintenance of this action would therefore violate the rights of defendant Lando under the Constitution of the United States.

AS AND FOR A THIRD COMPLETE DEFENSE TO EACH CAUSE OF ACTION

36) The publications charged to be defamatory were based on information communicated to defendant Lando by reliable persons and from reliable sources and were believed by defendant to be true and a fair and accurate report regarding the course and conduct of public and official proceedings, published by defendant Lando in good faith without malice, and said publications are therefore privileged.

*Answer of Barry Lando*AS AND FOR A FOURTH COMPLETE DEFENSE
TO THE SECOND CAUSE OF ACTION

37) Defendant Lando was privileged as to the contents of Exhibit B because it was necessary and appropriate to defend his reputation against statements concerning him which had been made by plaintiff.

WHEREFORE, defendant Lando respectfully prays that this Court enter a judgment dismissing the complaint and awarding defendant Lando his reasonable costs and disbursements, together with such other and further relief as the Court may deem just and proper.

New York, N. Y.

March 15, 1974

RICHARD G. GREEN
Attorney for defendant
Barry Lando
Office & P. O. Address
1270 Avenue of the Americas
New York, N. Y. 10020
Tel. No. 212-246-8689

Amended Answer of Defendant Lando

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[TITLE OMITTED IN PRINTING.]

Defendant, BARRY LANDO, by RICHARD G. GREEN, his attorney, for his amended answer to the complaint herein:

1) Denies each and every allegation contained in paragraphs 9, 13, 17, 19, 20, 23, 27, 28, 30, 31, 33, 34, 38, 39, 51, 52 and 53.

2) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 48 and 49.

3) Denies each and every allegation contained in paragraph 1 except the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars.

4) With respect to paragraph 2, denies knowledge or information sufficient to form a belief as to when plaintiff caused to be written a book entitled "SOLDIER."

5) Denies each and every allegation contained in paragraph 3, except that at all times hereinafter mentioned defendant Lando is and was an employee of defendant COLUMBIA BROADCASTING SYSTEM, INC. (misnamed in paragraph 3 of the complaint COLUMBIA BROADCASTING SYSTEMS, INC.) in which capacity he produced a segment, entitled "THE SELLING OF COL. HERBERT" (hereinafter "Selling") of a program entitled "SIXTY MINUTES" which was broadcast on the CBS Television Network from its studio in New York City on February 4, 1973, and who, subsequent thereto, wrote and submitted to ATLANTIC MONTHLY COMPANY (hereinafter "Company") an article entitled "THE HERBERT

Amended Answer of Defendant Lando

AFFAIR" (hereinafter "Affair") which was published in the May, 1973 issue of "THE ATLANTIC MONTHLY" magazine (hereinafter "Monthly").

6) Admits each and every allegation contained in paragraph 6 except denies upon information and belief that defendant "Company" is, or at the times mentioned in the complaint, was engaged in any business in the State of New York, including, without limitation, the publication, distribution or sale in New York State of "Monthly".

7) Denies each and every allegation contained in paragraph 7 except plaintiff enlisted in the United States Army at 17 years of age, rose in the ranks and toured the United States and foreign countries representing the United States Army and had a good reputation for courage under fire, and defendant Lando denies knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff was selected by Gen. Matthew B. Ridgeway in November, 1951 as the outstanding American soldier in Korea.

8) Denies each and every allegation contained in paragraph 8 except plaintiff was relieved of command by his superior brigade officers and a poor efficiency rating was placed against his record which was subsequently removed by the Secretary of the Army upon review.

9) Denies each and every allegation contained in paragraph 10 except in September, 1970 plaintiff made charges to the Third Army Inspector General at Fort McPherson and said charges were subsequently referred to the U.S. Army Criminal Investigation Division Agency (USA-CIDA), and in or about March of 1971, plaintiff filed formal charges against General Barnes and Colonel Franklin.

10) Denies each and every allegation contained in paragraph 11 except in or about March, 1971 it became known beyond the military and Department of Defense and it became a matter of wide public interest that plaintiff was charging war crimes and command cover-up.

Amended Answer of Defendant Lando

11) Denies each and every allegation contained in paragraph 12 except defendant Lando first met plaintiff at Natural Bridge, Virginia in or about July 1, 1971.

12) Denies each and every allegation contained in paragraph 14.

13) Denies each and every allegation contained in paragraph 15, except defendants Lando and Wallace are and at the time of the production, presentation and broadcast of "Selling", were employees of defendant CBS.

14) Denies each and every allegation contained in paragraph 16, except "Selling" was produced by defendant Lando and was broadcast by defendant CBS on February 4, 1973 to millions of viewers.

15) Denies each and every allegation contained in paragraph 18 including all its subparagraphs except, an audio transcript of "Selling" as broadcast on CBS is annexed to the complaint as Exhibit "A".

16) Denies each and every allegation contained in paragraph 21.

17) Denies each and every allegation contained in paragraph 22.

18) Denies each and every allegation contained in paragraph 24 except defendant Lando interviewed Captain Richard Heintz, and statements attributed to Captain Heintz appeared in "Selling".

19) Denies each and every allegation contained in paragraph 25 except "Selling" was presented for approximately 35 minutes of air time and that except for the portion of the interview during which both plaintiff and Major James Grimshaw were present, plaintiff was interviewed in New York by defendant Wallace without the presence of any other person who appeared on the program.

Amended Answer of Defendant Lando

20) Denies each and every allegation contained in paragraph 26 including all its subparagraphs, except, as to subparagraph (e) defendant Lando, after the interview and outside the interview room, responded to plaintiff's accusation that defendant Lando produced the program out of spite because defendant Lando was not writing the book on plaintiff by stating that if plaintiff continued to make this kind of accusation, defendant Lando would "get" plaintiff by suing him for libel; and as to subparagraph (f) the executive producer of SIXTY MINUTES was present at said interview.

21) Denies each and every allegation contained in paragraph 29 including all its subparagraphs, except, as to subparagraph (a) an interview of Major James Grimshaw was conducted in the Pentagon, in a smaller, less comfortable studio, than the environment of plaintiff's interview, with Army personnel in attendance; and as to subparagraph (g) "Selling" reported that numerous persons interviewed supported plaintiff's leadership as a battalion commander and some denied that plaintiff was a brutal or a ruthless killer.

22) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 32 except denies defendant Lando's activities were malicious.

23) Repeats the answers hereinbefore made to each and every allegation repeated and realleged in paragraph 35 of the complaint.

24) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 36 except "Monthly" is a magazine of national circulation.

25) Denies each and every allegation contained in paragraph 37 except "Affair" was published by defendant "Company" in the May, 1973 issue of "Monthly", Volume 231, Number 5.

Amended Answer of Defendant Lando

26) Denies each and every allegation contained in paragraph 40 except a copy of "Affair" as published in "Monthly" is annexed to the complaint as Exhibit "B" and defendant Lando wrote the article "Affair" except for the introductory first paragraph and defendant Lando did not draw or select the illustrations for the article.

27) Denies each and every allegation contained in paragraph 41 including all its subparagraphs, except as to subparagraph (a) the words quoted were used in "Affair" (p. 75 Exhibit "B" of the complaint, hereinafter "Ex. B."), but the quotation is not a complete paragraph, as indicated in the complaint, but is a part of a paragraph which reads in full:

When Army investigators finally cleared General Barnes in October, 1971, the Army partially took the wraps off. Reporters who inquired about the case had interviews arranged for them with several officers who had known Herbert in the 173rd and disputed his charges. Many leveled accusations against Herbert, claiming he himself had treated enemy POW's brutally, had damaged at least one civilian hamlet, and had exaggerated or otherwise misrepresented body counts.

(Emphasis above and hereinafter added to show material omitted from quotation in complaint)

; and denies defendant Lando maliciously omitted any facts in "Affair" and denies knowledge or information sufficient to form a belief as to the remainder of subparagraph (a); as to subparagraph (b) the words quoted were used in "Affair" (p. 76, Ex. B), but the quotation is not a

Amended Answer of Defendant Lando

complete paragraph, as indicated in the complaint, but is extracted from the middle of a paragraph which reads in full:

The reason for that standoff was that most of the Army personnel who had been interviewed and had attacked Herbert were either interested parties such as General Barnes, or men who made damning charges about Herbert's character but had no direct knowledge of the specific charges that Herbert was making. Many other officers, who might have effectively challenged several of Herbert's charges, kept silent, either because they had respected him in Vietnam, or because they just did not want to tangle with him. Although many reporters now held strong doubts about Herbert's case, no newspaper, magazine or network felt compelled to give any investigator the necessary time to probe further and discover who was lying.

; as to subparagraph (e) the words quoted were used in "Affair" (p. 79, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is only the beginning of the paragraph which reads in full:

It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York Times piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd seen were investigated,' he said. 'It made sense to me to try to follow the book on this and clear myself.'

Amended Answer of Defendant Lando

; and as to subparagraph (d) the words quoted were used in "Affair" (p. 80, Ex. B) as quoted.

28) Denies each and every allegation contained in paragraph 42 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair", (p. 75 Ex. B) as quoted, and denies knowledge or information sufficient to form a belief as to whether the Army refused to permit Franklin and Barnes to be examined by the same expert examiner who had tested plaintiff; as to subparagraph (c) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (d) the words quoted were in "Affair" (p. 78, Ex. B) as quoted; and as to subparagraph (e) the words quoted were used in "Affair" (p. 77, Ex. B), but the quotation is not a complete paragraph as indicated in the complaint, but comes from the middle of a longer paragraph which reads in full:

We double-checked Army records to make certain that the action involving the massacre had indeed taken place on February 14. The Army put us in contact with two officers who claimed they had flown with Franklin to Hawaii on February 9 and returned with him to Cam Ranh Bay on February 16. Hotel records in Hawaii showed that both officers had been there at the time they claimed. Still, there was doubt. Both officers admitted to disliking Herbert. We also contacted a former chopper pilot, now a civilian, who claimed he had picked Franklin up at Cam Ranh Bay when he returned, and it was after February 14. Franklin's bill from the Illikai Hotel in Honolulu had Colonel and Mrs. Franklin registered there from February 7 to February 14. What that meant, said Herbert, was that, since R&R is only five days, Franklin had arrived in Hawaii on the 7th, left on the 12th, which conceivably could have him back at headquarters by the evening of the 14th.

Amended Answer of Defendant Lando

29) Denies each and every allegation contained in paragraph 43 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 80 Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, inasmuch as the paragraph quoted ends with the phrase "A few examples:" and then continues for a column and a half to cite examples; as to subparagraph (b) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (d) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (e) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (f) the words quoted were used in "Affair" (p. 76 Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is from a paragraph which reads in full:

After being off on other stories, I was back onto Herbert. Over the next few weeks, SIXTY MINUTES researcher Mark Frederiksen and I spoke with more than a hundred and twenty people who had known Herbert through his career. Some of them had been mentioned in SOLDIER. One after another refuted many of Herbert's claims.

; as to subparagraph (g) the words quoted were used in "Affair" (p. 76, Ex. B), but the quotation is taken out of context, the first six words coming from one paragraph, the balance coming from the succeeding paragraph, and the two paragraphs read in full:

Since the first glowing report I had done on Herbert, I had gone to work as a producer for SIXTY MINUTES. One of the first things I did was to push for a story on Herbert. I was still convinced he was telling the truth and he had continued to assure me, and other reporters, that as soon as he retired in February, 1972, he would make available more documents to substantiate his case. When I

Amended Answer of Defendant Lando

flew to Atlanta in March, 1972, Herbert gave me transcripts of a number of telephone interviews with soldiers who seemed to support his claims. He also put me in touch with other men, giving me name after name of people who, he confidently said, would back his stories. I WANTED to believe in Herbert and now I see that I minimized the many discrepancies in his stories. When I showed Mike Wallace some of the information I had gathered on Herbert, including some newspaper reports questioning his story, Wallace looked through the material and announced that he thought Herbert was lying. His comment made me the more intent on proving Herbert was telling the truth.

That turned out to be difficult. When I started contacting the people to whom Herbert had directed me, they were, when pinned down, not able to substantiate Herbert's claims, not even on an off-the-record basis. Even as my doubts grew, Herbert kept furnishing new names, new facts, new explanations. Then, in April, I received a call from a mutual acquaintance who told me Herbert had claimed that the SIXTY MINUTES show on him was being postponed because we were now planning to devote the full hour to him—his was such an important story—rather than the usual fifteen-or-twenty minute segment.

30) Denies each and every allegation contained in paragraph 44 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 78, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph, which reads in full:

There is an inexplicable gap of almost eighteen months between the time Herbert was relieved, April 5, 1969, and the day he formally brought his war

Amended Answer of Defendant Lando

crime charges to the Army CID, September 23, 1970. Herbert claims he was constantly trying to get his charges investigated during that period, but he has no written evidence whatsoever to back up his claim. *We contacted all the Army officers Herbert said he had tried to report war crimes to while in Saigon. Most recalled talking with Herbert about his request for a formal inquiry into his relief from command. But all, including Colonel John Douglas, the Army's top lawyer and judge in Vietnam, denied that Herbert ever mentioned war crimes.*

; as to subparagraph (b) the words quoted were used in "Affair" (p. 79, Ex. B), but what appears to be a second paragraph in the complaint is not a paragraph but is part of the first paragraph, and the last paragraph is incomplete, the complete paragraphs reading in full:

According to Herbert, during the several months he spent at Fort Leavenworth, Kansas, after leaving Vietnam, he worked ceaselessly, spent \$8,000 of his own money, getting statements, contacting witnesses, all to buttress his war crimes case. Herbert does have several statements from officers praising him as a commander, which he used to appeal the damaging efficiency report in his record; but there is not a word relating to war crimes.

It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. *And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York TIMES piece on Herbert: 'He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd*

Amended Answer of Defendant Lando

seen were investigated,' he said. 'It made sense to me to try to follow the book on this and clear myself.'

; as to subparagraph (c) the words quoted were used in "Affair" (p. 79, Ex. B) but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph which reads in full:

Nowhere in the entire one hundred and sixty pages of transcript of the official inquiry into Herbert's relief is there any mention by Herbert of war crimes. Why? Herbert first claimed that Army regulations prevented him from including war crime charges in his appeal. Army regulations say nothing of the kind. *Herbert then claimed he did try to raise the charges during his appeal, but was advised not to by General Joseph Russ, the presiding officer. General Russ denies this. So do the court recorder and the military lawyer assigned to Herbert's case.*

; and as to subparagraph (e) the words quoted were used in "Affair" (p. 75, Ex. B) but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph which reads in full:

The Army also produced an official 'fact sheet' disputing Herbert's claims point by point. According to the Army, of the twenty-one allegations made by Herbert to the CID, only seven 'had sufficient substance to warrant action or further investigation.' Of those, three had already been investigated in Vietnam and one was a case that was not under U.S. jurisdiction. *As for the remaining three incidents, including the February 14 killings, the Army claimed there was no evidence other than Herbert's own word, that he had actually reported those cases to Franklin and Barnes.*

Amended Answer of Defendant Lando

31) Denies each and every allegation contained in paragraph 45 except, the words quoted were used in "Affair" (p. 81, Ex. B) but the quotation that appears to follow the first quoted paragraph does not follow it, said quotation is not a complete paragraph and the complete paragraphs read in full:

What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.

The Army has not released the contents of its investigation into the Herbert affair. The Army is not compelled to do so. There is no recent precedent for such disclosure, though it would presumably go a long way toward clearing the air. The Army, however, may well resist publishing the information because it would include many accounts of atrocities that would further damage the Army's own reputation.

It is important not to let the vagaries of the Herbert affair obscure the fact that atrocities did occur before Herbert's eyes and the eyes of countless others. Indeed, the argument can be made that Herbert, whatever his distortions and inventions, is to be thanked for keeping the nation's eyes on the war crimes issue. But I am not comfortable with that argument, because it forgets the responsibility of the press. The press, which long had been negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we bought ourselves a martyr with feet of clay.

Amended Answer of Defendant Lando

32) Denies each and every allegation contained in paragraph 46 except the words quoted in subparagraphs (a), (b) and (c) appear in "Affair" (pp. 76, 73 and 77, Ex. B) as quoted; and the words quoted in subparagraph (d) appear in "Affair" (p. 76, Ex. B), but what appears to be the first quoted paragraph is not the beginning of that paragraph, and what appears to be a second quoted paragraph is in fact part of the first quoted paragraph which reads in full:

By the time we were ready to interview Herbert (and others) for the Sixty Minutes show, the story had of course turned into something far different from the admiring profile I had thought would result. As soon as Mike Wallace's TV interview with him was filmed, Colonel Herbert turned on me, in his eyes an admirer now turned enemy, and challenged me to deny that I had originally wanted to write a book about him. I was startled; of course that was true, but I had almost forgotten it. In fact, my interest in collaborating with him had ended even before I developed doubts about his story. Herbert kept pressing the point, intimating that all along I had been engaged not in journalism, but a vendetta. Angered, I told him that if he went on in this way I would "get" him, that I had recourse to libel action. I came to regret that outburst, because subsequently Colonel Herbert was to cite this confrontation as proof that the CBS television show was a willful plot on my part to discredit him (an impossibility, since others have the last say about the content and purposes of SIXTY MINUTES) and to defile his true story.

33) Denies that the statements referred to in paragraph 47 were false and defamatory, and denies knowledge or information sufficient to form a belief as to each and every other allegation contained in paragraph 47, except

Amended Answer of Defendant Lando

admits "Company" published the introduction to "Affair" in the words set forth on the first page of Exhibit B.

34) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 50 except denies "Affair" was false and malicious and contained malicious content and intent.

AS AND FOR A FIRST COMPLETE DEFENSE TO EACH CAUSE OF ACTION

35) The complaint fails to state a cause of action upon which relief can be granted.

AS AND FOR A SECOND COMPLETE DEFENSE TO EACH CAUSE OF ACTION

36) The publications charged to be defamatory are privileged under the First and Fourteenth Amendments to the Constitution of the United States and maintenance of this action would therefore violate the rights of defendant Lando under the Constitution of the United States.

AS AND FOR A THIRD COMPLETE DEFENSE TO EACH CAUSE OF ACTION

37) The publications charged to be defamatory were based on information communicated to defendant Lando by reliable persons and from reliable sources and were believed by defendant to be true and a fair and accurate report regarding the course and conduct of public and official proceedings, published by defendant Lando in good faith without malice, and said publications are therefore privileged.

Amended Answer of Defendant Lando

AS AND FOR A FOURTH COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION

38) Defendant Lando was privileged as to the contents of Exhibit B because it was necessary and appropriate to defend his reputation against statements concerning him which had been made by plaintiff.

AS AND FOR A FIFTH COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION

39) Defendant Company is a Massachusetts corporation. Upon information and belief Company does not have any offices or employees in the State of New York, does not conduct and has not conducted any business in the State of New York, and has not been authorized to do so.

40) Defendant Lando is a Canadian citizen who resides in the State of Maryland. The agreement for "Affair" between defendants Company and Lando was entered into outside New York, the correspondence between defendants Company and Lando was engaged in outside New York and "Affair" was written by Lando wholly without New York State. Lando did not transact any business in New York which gave rise to the second cause of action. The Court therefore lacks in personam jurisdiction over defendant Lando.

AS AND FOR A SIXTH COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION

41) Defendant Lando repeats and realleges each and every allegation contained in paragraph 39 hereinabove.

42) Plaintiff is a citizen of and resident of the State of Georgia.

Amended Answer of Defendant Lando

43) Defendant Lando is a Canadian citizen and a resident of the State of Maryland.

44) Plaintiff's alleged second cause of action contained in the Complaint did not arise in the State of New York.

45) The Southern District of New York is therefore not a proper venue for this cause of action.

WHEREFORE, defendant Lando respectfully prays that this Court enter a judgment dismissing the complaint and awarding defendant Lando his reasonable costs and disbursements, together with such other and further relief as the Court may deem just and proper.

New York, New York
March 29, 1974.

RICHARD G. GREEN
Attorney for Defendant
Barry Lando
Office & P. O. Address
1270 Avenue of the Americas
New York, New York 10020
Tel. No. (212) 246-8689

Letter, Dated June 22, 1976, From Plaintiff's Counsel to Counsel for Wallace and CBS

LAW OFFICES
COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL
1370 Avenue of the Americas
New York, N. Y. 10019

BY HAND

June 22, 1976

Carleton G. Eldridge, Jr., Esq.
Coudert Brothers
200 Park Avenue
New York, New York 10017

Re: Herbert v. Lando, *et al.*
74 Civ. 434 (CSH)

Dear Carl:

Pursuant to Judge Haight's request that the parties exchange their views concerning disputed areas of discovery, please be advised that the following items will be the subject of plaintiff's Rule 37 motion directed to defendants CBS and Wallace:

(1) questions about or document relating to the usual custom and practices of CBS concerning the production and presentation of "60 Minutes" segments;

(2) questions concerning conclusions formed by Wallace and/or employees of CBS as to the veracity of witnesses interviewed for or in connection with the "60 Minutes" segment on Col. Herbert;

(3) questions about or documents relating to conversations or communications between Wallace and/or employees of CBS and representatives of the Nixon White

*Letter, Dated June 22, 1976, From Plaintiff's Counsel
to Counsel for Wallace and CBS*

House staff concerning (a) Col. Herbert, (b) CBS' coverage of the war in Vietnam, (c) CBS' coverage of war crimes, or (d) bias on the part of the Nixon Administration or White House staff against the news media in general or CBS in particular;

(4) questions concerning conversations between Wallace and representatives of the Pentagon about Col. Herbert and/or his charges as to which you have claimed journalists' privilege;

(5) questions about or documents relating to conversations or communications between Wallace and/or employees of CBS concerning Col. Herbert, his charges, and/or the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon which took place after the broadcast on February 4, 1973;

(6) questions about or documents relating to expenses incurred by CBS or any agent, employee or representative thereof in preparing and presenting the "60 Minutes" segment on Col. Herbert;

(7) a document identified by Barry Lando as a CBS memorandum on the subject matter of a request from the attorney for Col. J. Ross Franklin to obtain CBS' cooperation in providing information in connection with a possible lawsuit against Col. Herbert, and questions concerning that memorandum;

(8) documents in the possession of CBS, its agents, representatives or employees, during the period from June, 1971 to February 4, 1973 regarding (a) Col. Herbert, (b) war crimes, (c) conduct of the 173rd Airborne Brigade in Vietnam, (d) individuals appearing or referred to on the "60 Minutes" segment, or (e) events set forth in *Soldier*;

*Letter, Dated June 22, 1976, From Plaintiff's Counsel
to Counsel for Wallace and CBS*

(9) documents relating to correspondence or communications between Wallace and/or employees of CBS and (a) Gerard McCauley, plaintiff's agent, (b) James Wooten, plaintiff's co-author of *Soldier*, (c) Holt Rinehart & Winston, publisher of *Soldier*, and (d) employees or representatives of Atlanite Monthly concerning Col. Herbert, his charges, and/or the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon;

(10) internal or inter-office CBS memoranda or correspondence prepared between June, 1971 and May, 1973 concerning (a) coverage of the Vietnam War and conduct of U. S. military personnel, (b) alleged anti-war bias on the part of the news media in general or CBS in particular, (c) pressure from the Nixon Administration or White House staff on the media, (d) coverage of war crimes and/or allegations concerning their concealment or cover-up;

(11) documents relating to communications between employees of CBS and employees of Holt Rinehart & Winston concerning royalty payments to plaintiff or James Wooten in connection with *Soldier*;

(12) questions about or documents relating to conversations or communications by Wallace and/or employees of CBS with or to anyone at any time, including post-litigation, concerning (a) Col. Herbert, (b) his charges, and/or (c) the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon.

With regard to items numbered (3), (8), (9), (10) and (12), we note that defendants have produced documents and answered some questions pertaining to materials specifically acquired or made, or conversations held, in

*Letter, Dated June 22, 1976, From Plaintiff's Counsel
to Counsel for Wallace and CBS*

the course of the preparation and publication of the "60 Minutes" segment. However, we believe that the existence of such documents in defendants' possession, or the facts surrounding such conversations by defendants, have a direct bearing upon defendants' intentions and upon the issue of recklessness and malice, and are thus discoverable.

With the exception of the memoranda described in (7) which CBS has declined to produce on grounds of attorney-client privilege, we know of no areas in dispute concerning communications between Wallace and/or CBS and counsel.

Many of the areas in dispute concern defendants' response to plaintiff's First Rule 34 Request. We summarized our position on your response in our letter of July 25, 1974. We have attempted to group many of those items together in this letter to avoid undue repetition; some of these matters seem particularly appropriate for resolution in advance of our conference with Judge Haight and a formal motion.

The pages from the Wallace, Hewitt & Leonard depositions which contain references to these disputed areas include the following: Wallace—132-137, 165-167, 225-228, 275-282, 327-328, 349-351; Hewitt—107-113, 124A-126, 138-139, 140-141, 147-148, 154-157; Leonard—19-22, 89-92. CBS' position that item number (7) will not be produced is set forth at pp. 977-978 of the Lando deposition.

If it is possible to arrange for an informal conference before July 6, we will be happy to sit down with you to try to resolve as many areas as possible. The most con-

*Letter, Dated June 22, 1976, From Plaintiff's Counsel
to Counsel for Wallace and CBS*

venient dates for us for such a meeting are Friday, June 25 in the morning or after 3:00 P.M. or Friday, July 2, 1976.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN &
LUBELL

MARY K. O'MELVENY

MKO'M:lle

cc: Honorable Charles S. Haight, Jr.
United States District Judge

U. S. Courthouse
Chambers, Room 2904
Foley Square
New York, New York 10007

Richard G. Green, Esq.
Green & Hillman
1270 Avenue of the Americas
New York, New York 10020

Charles Rembar, Esq.
Rembar, Wolf & Curtis
19 West 44th Street
New York, New York

**Letter, Dated June 22, 1976, From Plaintiff's Counsel
to Counsel for Defendant Lando**

LAW OFFICES
 COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL
 1370 Avenue of the Americas
 New York, N. Y. 10019

BY HAND

June 22, 1976

Richard G. Green, Esq.
 Green & Hillman
 1270 Avenue of the Americas
 New York, New York 10020

Re: Herbert v. Lando, *et al.*
 74 Civ. 434 (CSH)

Dear Dick:

Pursuant to Judge Haight's request that the parties exchange their views concerning disputed areas of discovery, please be advised that the following items will be the subject of plaintiff's Rule 37 motion directed to defendant Barry Lando:

(1) questions concerning matters which Barry Lando proposed or discussed including in, or excluding from, the "60 Minutes" segment on Col. Herbert;

(2) questions concerning Lando's belief or intent as a basis for including in, or excluding from, the "60 Minutes" segment or the Atlantic article reference to specific matters, facts and events;

(3) questions concerning matters which Lando considered, or was interested in, mentioning on the "60 Minutes" segment;

*Letter, Dated June 22, 1976, From Plaintiff's Counsel
to Counsel for Defendant Lando*

(4) questions about or documents relating to (a) Lando's general custom and practices as an employee of CBS and/or the "60 Minutes" program, (b) his custom and practice in connection with the "60 Minutes" segment on Col. Herbert, and/or (c) CBS' general custom and practices in connection with "60 Minutes."

(5) questions concerning Lando's knowledge and understanding about what constituted a war crime;

(6) questions concerning Lando's opinions and conclusions concerning the truth and accuracy of persons interviewed, appearing on or referred to in connection with the "60 Minutes" segment or the Atlantic Monthly article;

(7) questions concerning conclusions reached by Lando about specific events referring or related to the "60 Minutes" segment or the Atlantic Monthly article;

(8) questions concerning the basis for Lando's conclusions regarding people or leads to be pursued, or not to be pursued, in connection with the "60 Minutes" segment and the Atlantic Monthly article;

(9) questions concerning Lando's intentions and/or state of mind about Col. Herbert;

(10) questions about or documents relating to conversations or communications between Lando and representatives of the Nixon Administration or White House staff concerning (a) Col. Herbert, (b) CBS' coverage of the war in Vietnam, (c) CBS' coverage of war crimes, or (d) bias on the part of the Nixon Administration or White House staff against the news media in general or CBS in particular;

*Letter, Dated June 22, 1976, From Plaintiff's Counsel
to Counsel for Defendant Lando*

- (11) questions about or documents relating to expenses incurred by Lando, CBS or any agent, employee or representative thereof in preparing and presenting the "60 Minutes" segment on Col. Herbert;
- (12) questions concerning the document identified by Barry Lando as a CBS memorandum on the subject matter of a request to Lando from the attorney for Col. J. Ross Franklin to obtain CBS' cooperation in providing information in connection with a possible lawsuit against Col. Herbert;
- (13) documents in the possession of Lando or CBS during the period from June, 1971 to May, 1973 regarding (a) Col. Herbert, (b) war crimes, (c) conduct of the 173d Airborne Brigade in Vietnam, (d) individuals appearing or referred to on the "60 Minutes" segment, or (e) events set forth in *Soldier*;
- (14) documents relating to correspondence or communications between Lando and/or CBS and (a) Gerard McCauley, plaintiff's agent, (b) James Wooten, plaintiff's co-author of *Soldier*, (c) Holt Rinehart & Winston, publisher of *Soldier*, and (d) employees or representatives of Atlantic Monthly concerning Col. Herbert, his charges, and/or the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon;
- (15) documents and questions concerning communications between Lando and the Department of Army, Department of Defense or Central Intelligence Agency on the subject of (a) Herbert, (b) officers or enlisted men assigned to the 173d Airborne Brigade in 1968 and 1969, (c) activities of the 173d Airborne Brigade in 1968 and 1969, (d) the preparation and publication of the "60 Minutes" segment on Herbert or the Atlantic Monthly article, and (e) *Soldier*.

*Letter, Dated June 22, 1976, From Plaintiff's Counsel
to Counsel for Defendant Lando*

- (16) questions about and documents reflecting communications between Lando or CBS between June, 1971 and May, 1973 concerning (a) coverage of the Vietnam War and conduct of U. S. military personnel, (b) alleged anti-war bias on the part of the news media in general or CBS in particular, (c) pressure from the Nixon Administration or White House staff on the media, (d) coverage of war crimes and/or allegations concerning their concealment or cover-up;
- (17) questions about or documents relating to conversations or communications by Lando and/or employees of CBS with or to anyone at any time, including post-litigation, concerning (a) Col. Herbert, (b) his charges, and/or (c) the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon.
- (18) questions concerning conversations between Lando and CBS between February 4, 1973 and May, 1973 about the Atlantic Monthly article;
- (19) questions concerning conversations between Lando and anyone concerning his proposed article on Col. Herbert prior to its publication by Atlantic;
- (20) questions concerning conversations between Lando and Atlantic Monthly regarding the contents of the article on Col. Herbert following its publication.

With the exception of the memoranda described in (7) which CBS has declined to produce on grounds of attorney-client privilege, we know of no areas in dispute concerning communications between Lando and/or CBS and counsel.

With regard to items numbered (10), (13), (14), (15) and (16), we note that defendant has produced documents and answered questions pertaining to materials or conversations specifically acquired, made for or held in the course of the preparation or publication of the "60

*Letter, Dated June 22, 1976, From Plaintiff's Counsel
to Counsel for Defendant Lando*

"Minutes" segment or the Atlantic Monthly article. However, we believe that existence of such documents in defendant's possession or facts of such conversations by defendant have a direct bearing upon defendant's intentions and upon the issue of recklessness and malice and are thus discoverable.

Many of the areas in dispute concern defendant's response to plaintiff's First Rule 34 Request. We summarized our position on your response in our letter of July 23, 1974. We have attempted to group many of those items together in this letter to avoid undue repetition; some of these matters seem particularly appropriate for resolution in advance of our conference with Judge Haight and a formal motion.

The directions to Lando not to answer questions in these various areas appear at the following transcript pages of the Lando deposition: 173-177, 418-422, 503-506, 522-528, 579-580, 586-587, 666-668, 773-774, 807, 840-842, 876-882, 921-922, *cf.* 977-978, 1094-1098, 1138-1139, 1147-1149, 1331-1332, 1452, 1485-1491, 1524-1526, 1526-1531, 1554-1555, 1567-1571, 1610-1611, 1618, 1629-1630, 1716-1717, 1741-1746, 1747-1748, 1753-1757, 1789-1791, 1791-1792, 1841-1842, 1872-1882, 1890-1892, 1900-1901, 1905-1908, 1909-1911, 1925-1926, 1943-1946, 1953-1955, 2013-2015, 2021-2029, 2063-2064, 2071-2072, 2085-2086, 2112, 2158, 2175-2176, 2178-2180, 2182-2183, 2286-2287, 2301-2304, 2311-2313, 2341-2342A, 2391-2393, 2453-2454, 2480, 2505-2506, 2556-2558, 2570-2573, 2577-2579, 2583-2586, 2594, 2658-2660, 2685 and 2694.

If it is possible to arrange for an informal conference before July 6, we will be happy to sit down with you to try to resolve as many areas as possible. The most

*Letter, Dated June 22, 1976, From Plaintiff's Counsel
to Counsel for Defendant Lando*

convenient dates for us for such a meeting are Friday, June 25 in the morning or after 3:00 P.M. or Friday, July 2, 1976.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN
& LUBELL

MARY K. O'MELVENY

MKO'M:llc

cc: Honorable Charles S. Haight, Jr.
United States District Judge
U. S. Courthouse
Chambers, Room 2904
Foley Square
New York, New York 10007

Carleton G. Eldridge, Jr., Esq.
Coudert Brothers
200 Park Avenue
New York, New York 10017

Charles Rembar, Esq.
Rembar, Wolf & Curtis
19 West 44th Street
New York, New York

Letter, Dated July 1, 1976, From Counsel for Defendants Wallace and CBS to Plaintiff's Counsel

COUDERT BROTHERS
ATTORNEYS AND COUNSELLORS AT LAW
200 Park Avenue
New York, N. Y. 10017

July 1, 1976

Mary K. O'Melveny, Esq.
Cohn, Glickstein, Lurie,
Ostrin & Lubell
1370 Avenue of the Americas
New York, New York 10019

Re: Herbert v. CBS, *et al.*
74 Civ. 434 (CSH)

Dear Mary:

In response to your letter of June 22, 1976 outlining the areas of discovery with respect to which plaintiff is pursuing Rule 37 relief, I am writing on behalf of defendants Mike Wallace and CBS to set forth the following views:

While each of the twelve numbered paragraphs in your letter identify your characterization of disputed areas in discovery and while you also list generally the contested questions upon oral examination of Messrs. Leonard, Hewitt and Wallace, you have not identified under each of your categories the specific questions which drew objections. Upon our review of the transcripts, we have made an attempt to isolate the questions which may relate in substance to those categories. The text of each objectionable question is set forth with corresponding transcript page and line reference under each of your numbered categories in the memorandum accompanying this letter. Here, we draw your attention to your numbered areas of dispute, the page and line reference to

Letter, Dated July 1, 1976, From Counsel for Defendants Wallace and CBS to Plaintiff's Counsel

questions which drew an objection and our stated grounds for objection to questions and, where necessary, to your requests for production of documents.

PLAINTIFF'S PARAGRAPH (1): "Questions about or documents relating to the usual custom and practices of CBS concerning the production and presentation of '60 Minutes' segments."

HEWITT:

Page 124(a), line 18
Page 140, line 8
Page 140, line 23
Page 141, line 7
Page 141, line 17

LEONARD: No questions.

WALLACE:

Page 279, line 15.

BASIS OF OBJECTION: Defendants Mike Wallace and CBS object to the questions listed above on the grounds and that information relating to general CBS policies are entirely irrelevant to the issues raised by the pleadings and therefore are not likely to lead to the discovery of admissible evidence. Whether CBS had any policy, whether investigative reporters adhered to or departed from some policy, whether CBS was in the practice of conducting a dozen filmed interviews or one filmed interview of the same person, are all questions which have no bearing upon any issue raised by the pleadings. There is no dispute but that in this case, plaintiff's libel claim is governed by *New York Times v. Sullivan* and its progeny. Accordingly, it is settled that the dispositive issues turn upon plaintiff's clear and convincing proof of falsity and knowledge of falsity of reported

Letter, Dated July 1, 1976, From Counsel for Defendants Wallace and CBS to Plaintiff's Counsel

fact. None of those questions listed above are calculated to lead to the discovery of admissible evidence on those issues.

PLAINTIFF'S PARAGRAPH (2): "Questions concerning conclusions formed by Wallace and/or employees of CBS as to the veracity of witnesses interviewed for or in connection with the '60 Minutes' segment on Colonel Herbert."

LEONARD: No questions.

WALLACE: No questions.

HEWITT:

Page 151, line 24.

BASIS OF OBJECTION: The primary basis of the objection to the question appearing at page 151, line 24 of the Hewitt deposition is that, inasmuch as Mr. Hewitt had not testified to knowledge and, in fact, did not know the identity of specific individuals interviewed who were at the "POW compound in Vietnam", the question is lacking in foundation and, in its form is impossible to answer.

As an additional ground, defendant CBS contends that in no event is this category of question relevant to the issues raised by the pleadings; or likely to lead to the discovery of admissible evidence. For elaboration, your attention is directed to our view of the application of the *Sullivan* rule as the basis of the objection to those questions set forth above in connection with your paragraph (1).

PLAINTIFF'S PARAGRAPH (3): "Questions about or documents relating to conversations or communications between Wallace and/or employees of CBS and representatives of the Nixon White House Staff concerning (a) Colonel Herbert, (b) CBS' coverage of the war in Vietnam, (c) CBS' coverage of war crimes, or (d) bias

Letter, Dated July 1, 1976, From Counsel for Defendants Wallace and CBS to Plaintiff's Counsel

on the part of the Nixon Administration or White House staff against the news media in general or CBS in particular."

LEONARD:

Pages 87-89

WALLACE:

Pages 132, line 3 through 133, line 19

HEWITT:

Colloquy between counsel at pages 154, lines 23 through 156, line 6

BASIS OF OBJECTION: Upon our review of relevant transcripts, we find that no question relating to paragraph 3(a) drew an objection which resulted in a direction not to answer. With respect to paragraph 3(b), 3(c) and 3(d) defendants Mike Wallace and CBS object on the grounds that under no theory can it be argued that questions relating generally to CBS' coverage of the war in Vietnam, CBS' coverage of war crimes or bias on the part of the Nixon Administration or White House staff against the news media in general or CBS in particular can yield any evidence relevant to said requisite proof of falsity and knowledge of falsity of any material fact included in either the CBS broadcast or any material fact in the voluminous file of documents produced by defendants in this case.

PLAINTIFF'S PARAGRAPH (4): "Questions concerning conversations between Wallace and representatives of the Pentagon about Col. Herbert and/or his charges as to which you have claimed journalist's privilege";

LEONARD: No questions.

HEWITT: No questions.

Letter, Dated July 1, 1976, From Counsel for Defendants Wallace and CBS to Plaintiff's Counsel

WALLACE:

Page 226, line 5.

This is a claim of a journalists's privilege under Civil Rights Law Sec. 79-h and under the First Amendment to the United States Constitution as well as under Article I, Section 8 of the New York State Constitution.

PLAINTIFF'S PARAGRAPH (5): "Questions about or documents relating to conversations or communications between Wallace and/or employees of CBS concerning Col. Herbert, his charges, and/or the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon which took place after the broadcast on February 4, 1973."

LEONARD: No questions.

HEWITT: No questions.

WALLACE: No questions.

BASIS OF OBJECTION TO PRODUCTION OF DOCUMENTS: All documents in the possession of Mike Wallace and/or CBS which were acquired or generated in connection with the research, preparation and broadcast of "Selling" have been produced. To the extent this production request seeks documents which may have been generated or acquired by Mike Wallace and/or CBS subsequent to the date of the broadcast, defendants object to production on the grounds that the First Amendment Constitutional Privilege limits relevant inquiry to facts known to the persons responsible for the publication at the time of the broadcast. Such documents as may have been acquired or generated after the broadcast are irrelevant to the fact known at the time of the broadcast and therefore cannot lead to the discovery of admissible evidence. Without waiving the objection, we advise that, apart from documents requested

Letter, Dated July 1, 1976, From Counsel for Defendants Wallace and CBS to Plaintiff's Counsel

by counsel or acquired by counsel, defendants are not aware at this time of any additional documents relevant to the request set forth in plaintiff's paragraph (5).

PLAINTIFF'S PARAGRAPH (6): "Questions about or documents relating to expenses incurred by CBS or any agent, employee or representative thereof in preparing and presenting the '60 Minutes' segment on Col. Herbert";

LEONARD:

Page 22, line 4

HEWITT:

Page 138, line 6

Page 156, line 9—25 (relevant colloquy of counsel)

WALLACE: No questions.

BASIS OF OBJECTION TO QUESTION AND TO PRODUCTION OF DOCUMENTS: No documents reflecting the expenses incurred by defendants Mike Wallace and CBS in connection with the research, preparation and broadcast of "Selling" have been produced since it is the defendants' position that such requests and questions pertinent thereto are wholly irrelevant to the issues involved in the present litigation, are not calculated to lead to the discovery of admissible evidence and that they are burdensome and oppressive, particularly since—as stated by Mr. Hewitt during his deposition—such materials are not retained and filed by particular program segment such as "Selling" (pp. 137-8).

PLAINTIFF'S PARAGRAPH (7): "A document identified by Barry Lando as a CBS memorandum on the subject matter of a request from the attorney for Col. J. Ross Franklin to obtain CBS' cooperation in providing information in connection with a possible lawsuit against Col. Herbert, and questions concerning that memorandum";

Letter, Dated July 1, 1976, From Counsel for Defendants Wallace and CBS to Plaintiff's Counsel

HEWITT:

Page 109, line 18.

LEONARD: No questions.

WALLACE: No questions.

BASIS OF OBJECTIONS: The document in question has not been produced by defendant CBS because the contents thereof reflect advice from attorney to client. The question listed above is objectionable on the grounds that the answer to the question as framed, calls for testimony about confidential communications between attorney and client.

PLAINTIFF'S PARAGRAPH (8): "Documents in the possession of CBS, its agents, representatives or employees, during the period from June, 1971 to February 4, 1973 regarding (a) Col. Herbert, (b) war crimes, (c) conduct of the 173d Airborne Brigade in Vietnam, (d) individuals appearing or referred to on the '60 Minutes' segment, or (e) events set forth in *Soldier*;".

See objection made in response to plaintiff's paragraph (5).

PLAINTIFF'S PARAGRAPH (9): "Documents relating to correspondent or communications between Wallace and/or employees of CBS and (a) Gerard McCauley, plaintiff's agent, (b) James Wooten, plaintiff's co-author of *Soldier*, (c) Holt Rinehart & Winston, publisher of *Soldier*, and (d) employees or representatives of Atlantic Monthly concerning Col. Herbert, his charges, and/or the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon;".

All documents in the possession of Mike Wallace and/or CBS which were acquired or generated in connection with the research, preparation and broadcast of "Selling" have been produced.

Letter, Dated July 1, 1976, From Counsel for Defendants Wallace and CBS to Plaintiff's Counsel

PLAINTIFF'S PARAGRAPH (10): "Internal or inter-office CBS memoranda or correspondence prepared between June, 1971 and May, 1973 concerning (a) coverage of the Vietnam War and conduct of U. S. military personnel, (b) alleged anti-war bias on the part of the news media in general or CBS in particular, (c) pressure from the Nixon Administration or White House staff on the media, (d) coverage of war crimes and/or allegations concerning their concealment or cover-up";

BASIS OF OBJECTION: All documents in the possession of Mike Wallace and CBS acquired or prepared in connection with the research, preparation and broadcast of "Selling" have been produced. To the extent plaintiff's request goes beyond those documents, defendants have objected to production and continue to object on the grounds that, even if such documents did exist, they are irrelevant to the activities of CBS employees involved in the production and broadcast of "selling", are irrelevant to the publications sued upon in this action and therefore are not likely to lead to the discovery of admissible evidence.

PLAINTIFF'S PARAGRAPH (11): "Documents relating to communications between employees of CBS and employees of Holt Rinehart & Winston concerning royalty payments to plaintiff or James Wooten in connection with *Soldier*";

BASIS OF OBJECTION: Defendant CBS will produce correspondence, memoranda and telephone logs, if any exist, relating to or concerning the payments of royalties or advances against royalties; but to the extent that plaintiff requests other documents, particularly those relating to accounting procedures and royalty statements, defendant objects on the grounds that such documents are irrelevant to the issues involved in the present litigation and not likely to lead to the discovery of admissible evidence.

Letter, Dated July 1, 1976, From Counsel for Defendants Wallace and CBS to Plaintiff's Counsel

sible evidence, that defendant CBS is not required by the F.R.C.P. to produce documents which are not within its possession, custody or control and on the further ground that the production of such documents is burdensome and oppressive.

PLAINTIFF'S PARAGRAPH (12): "Questions about or documents relating to conversation or communications by Wallace and/or employees of CBS with or to anyone at any time, including post-litigation, concerning (a) Col. Herbert, (b) his charges, and/or (c) the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon."

HEWITT:

Page 147, line 3
 Page 147, line 25
 Page 148, line 8

WALLACE:

Page 166, line 4) Objection withdrawn. Wallace
) will fill in the answers prior
 Page 166, line 10) to execution of the transcript.

LEONARD: No questions.

BASIS OF OBJECTION TO QUESTIONS AND PRODUCTION OF DOCUMENTS: First, the question put to Mr. Hewitt drew objection because the interrogator failed to identify the specific conversations he had in mind after 147 or 148 pages of testimony had been given by the witness. Furthermore, the witness was not permitted to review all of the prior testimony relevant thereto. With respect to the category and the request for production of documents post-broadcast and post-litigation, defendants object on the grounds that such

Letter, Dated July 1, 1976, From Counsel for Defendants Wallace and CBS to Plaintiff's Counsel

questions and documentation are irrelevant to the issues raised by the pleadings for the reasons stated above and therefore are not calculated to lead to the discovery of admissible evidence.

The foregoing constitutes the summarization of the views of defendants Mike Wallace and CBS concerning the disputed areas of discovery outlined in your letter of June 22, 1976. We trust that it will aid in advancing your understanding of defendants' position with respect to specific objections and look forward to discussing these matters further during our July 2, 1976 meeting.

Very truly yours,

COUDERT BROTHERS
 By (Illegible)
 A Member of the Firm
 Attorneys for Defendants Mike Wallace
 and CBS Inc.

cc: Hon. Charles S. Haight, Jr.
 W. Mallory Rintoul, Esq.
 Richard G. Green, Esq.
 Charles Rembar, Esq.

**Letter, Dated July 1, 1976, From Counsel for Defendant
Lando to Plaintiff's Counsel**

GREEN & HILLMAN
LAWYERS
1270 Avenue of the Americas
New York, N. Y. 10020
—
CIrcle 6-8689

BY HAND

July 1, 1976

Ms. Mary K. O'Melveny
Cohn, Glickstein, Lurie, Ostrin & Lubell
1370 Avenue of the Americas
New York, New York 10019

Re: *Herbert v. Lando et al*

Dear Mary:

We refer to your letter of June 22, 1976 and to Judge Haight's request that the parties exchange their views concerning disputed areas of plaintiff's discovery.

While you enumerated in your letter disputed discovery items which plaintiff intends to pursue in his proposed Rule 37 motion, plaintiff has not designated the questions which fall into those areas, nor are any reasons stated why discovery should be allowed on those areas. Trying to work from page references on page 4 of your letter, we are unable to discern which questions fall into which category. It is also impracticable to attempt to fit most questions within a single category inasmuch as most were objected to for more than one reason. Furthermore we find that many of the questions on page 4 of your letter do not fit into any of the categories you list.

**Letter, Dated July 1, 1976, From Counsel for Defendant
Lando to Plaintiff's Counsel**

Finally, although your letter groups together your demands for document production with disputes arising out of the deposition of Barry Lando, for clarity's sake we have separated our comments on document production from those on deposition questions.

With regard to the testimony of Barry Lando, many of the questions which we objected to and directed the witness not to answer were questions that had been previously asked and answered, rephrased after an objection was raised and answered in rephrased form, argumentative or rhetorical, or were questions which had no foundation or required the witness to characterize documents which had already been marked for identification. Often times more than one of these grounds led to our objections and direction not to answer. Our remaining objections were made either because the questions were not relevant to any issue in this case and were not reasonably calculated to lead to the discovery of admissible evidence, or they were subject to a privilege (attorney-client, work product or materials prepared in anticipation of litigation or for trial).

Plaintiff has had 26 deposition sessions with Barry Lando, which produced nearly 3000 pages of transcript, with 240 exhibits. There has been extensive testimony by Barry Lando as to whom he interviewed, his discussions with interviewees and all forms and frequency of communications with them. Plaintiff has had full discovery as to the facts known to Barry Lando in the preparation and production of the 60 MINUTES segment "THE SELLING OF ANTHONY HERBERT" and the article "THE HERBERT AFFAIR." Plaintiff has also conducted nine other deposition sessions in connection with the discovery of defendants Atlantic Monthly Company, Mike Wallace and CBS, Inc.

*Letter, Dated July 1, 1976, From Counsel for Defendant
Lando to Plaintiff's Counsel*

Many of the questions to which we have raised objections concern subjective matters calling for inquiry into the witness' credibility evaluation of other witnesses' fact assertions, his beliefs, his intent, the editorial basis for including or excluding material, his conclusions and opinions and the basis for same. These questions do not seek to elicit facts but rather inferences to be drawn from the witness' testimony. Such questions are not a proper subject for discovery.

Regarding your demand for document production, as Barry Lando's response to your first request for the production of documents indicated would be done, he has produced all documents in his possession, custody or control which were prepared for or in the course of the preparation,* production and broadcast of the 60 MINUTES segment, "THE SELLING OF ANTHONY HERBERT", and all documents prepared for or in the course of the preparation and publication of the article "THE HERBERT AFFAIR." All other documents requested relate to such areas as Lando's general custom and practices as an employee of CBS (item 4), or to conversations or communications between Lando and representatives of the Nixon Administration or White House staff concerning CBS coverage of the Vietnam war, war crimes or bias on the part of the White House staff against news media in general or CBS in particular (your item 10). As to these areas, we do not see how such discovery is relevant

*Documents relating to expenditures incurred by Barry Lando during the course of the preparation of the 60 MINUTES segment "THE SELLING OF ANTHONY HERBERT" have been and will continue to be objected to on the grounds that such documents are not relevant to any issue in this action and are neither admissible nor reasonably calculated to lead to the discovery of admissible evidence, and such a document request is burdensome and oppressive.

*Letter, Dated July 1, 1976, From Counsel for Defendant
Lando to Plaintiff's Counsel*

to any issue in this action, admissible or reasonably calculated to lead to the discovery of admissible evidence.

Post-litigation documents—item 17 in your letter—are clearly objectionable on the basis of privilege in that any such documents were prepared in defense of litigation or as attorney's work product.

We look forward to meeting with you on July 2nd at 9:30 A.M. in the hope of resolving some of these matters before our conference with Judge Haight on July 6th.

Very truly yours,

GREEN & HILLMAN
By RICHARD GREENE

cc: Honorable Charles S. Haight, Jr.
United States District Judge
U.S. Courthouse
Chambers, Room 2904
Foley Square
New York, N.Y. 10007

Carleton G. Eldridge, Jr., Esq.
Coudert Brothers
200 Park Avenue
New York, New York 10017

Charles Rembar, Esq.
Rembar, Wolf & Curtis
19 West 44th Street
New York, New York 10036

be: W. Mallory Rintoul, Esq.

**Letter, Dated July 16, 1976, From Plaintiff's Counsel
to Counsel for Defendant Lando**

LAW OFFICES
 COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL
 1370 Avenue of the Americas
 New York, N. Y. 10019

July 16, 1976

Richard G. Green, Esq.
 Green & Hillman
 1270 Avenue of the Americas
 New York, New York 10020

Re: Herbert v. Lando, et al.
 74 Civ. 434 (CSH)

Dear Dick:

We have reviewed the open questions which Barry Lando was directed not to answer at his deposition. As we indicated to you at our last conference, we are setting forth below those open questions which we will not pursue in connection with plaintiff's Rule 37 motion.

Our elimination of the questions listed below is not intended as any agreement on our part with the direction to Mr. Lando not to answer those questions. Rather, this list represents our attempt to reduce the areas of dispute between us and our recognition that some of the questions were substantially answered during the deposition and other questions were answered before objection was made.

The questions which we propose to eliminate and which were referred to in our letter of June 22, 1976, appear at the following transcript pages of the Lando deposition: 418-422, 503-506, 807, 840-842, 921-922, 1094-1098, 1147-1149, 1452, 1567-1571, 1610-1611, 1629-1630, 1741-1746, 1841-1842,

**Letter, Dated July 16, 1976, From Plaintiff's Counsel to
Counsel for Defendant Lando**

1909-1911, 1943-1946, 2021-2029, 2063-2064, 2071-2072, 2112, 2158, 2175-2176, 2178-2180, 2182-2183, 2341-2342, 2391-2393, 2480, 2505-2506, 2577, 2594, 2658-2660, 2694.

We trust that you have also given serious reconsideration to your position on the open questions which remain. We are hoping to receive a revised list from you indicating a further reduction of the issues to be raised before Judge Haight on July 21, 1976.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN &
LUBELL

Jonathan W. Lubell

JWL:mf

BY HAND

cc: Hon. Charles S. Haight, Jr.
 United States District Judge
 U. S. Courthouse
 Chambers, Room 2904
 Foley Square
 New York, N.Y. 10007

Carleton G. Eldridge, Jr., Esq.
 Coudert Brothers
 200 Park Avenue
 New York, New York 10017

Charles Rembar, Esq
 Rembar, Wolf & Curtis
 19 West 44th Street
 New York, New York

**Letter, Dated July 19, 1976, From Plaintiff's Counsel to
Counsel for Defendants Wallace and CBS**

LAW OFFICES
 COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL
 1370 Avenue of the Americas
 New York, N. Y. 10019

July 19, 1976

Carleton G. Eldridge, Jr., Esq.
 Coudert Brothers
 200 Park Avenue
 New York, New York 10017

Re: Herbert v. Lando, et al.—74 Civ. 434 (CSH)

Dear Carl:

We set forth below any changes or modifications of plaintiff's position as previously described in the correspondence between us on questions that defendants Mike Wallace and CBS (Hewitt and Leonard) were directed not to answer and on certain Rule 34 document requests to which the said defendants Wallace and CBS objected. In arriving at our current position, we have considered our discussion of July 2 and 6, 1976, and your comments. We will generally follow the form of your July 1, 1976 letter.

Preliminarily, we note that our position on the open questions and demands rests upon the rules of law governing the nature of the evidence admissible in a libel case. As the Court of Appeals for this Circuit stated in *Goldwater v. Ginsburg*, 414 F. 2d 324, 342 (2nd Cir. 1969):

"There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity."

**Letter, Dated July 19, 1976, From Plaintiff's Counsel to
Counsel for Defendants Wallace and CBS**

PLAINTIFF'S PARAGRAPH (1): "Questions about or documents relating to the usual custom and practices of CBS concerning the production and presentation of '60 Minutes' segments."

WALLACE:

P. 279, l. 15 Plaintiff withdraws this question

PLAINTIFF'S PARAGRAPH (5): "Questions about or documents relating to conversations or communications between Wallace and/or employees of CBS concerning Col. Herbert, his charges, and/or the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon which took place after the broadcast on February 4, 1973."

There are no questions under this paragraph which CBS's representatives or Wallace were directed not to answer. You have advised us that apart from documents requested by counsel or acquired by counsel, defendants are not aware of any additional documents relevant to the request. In light of this advice, plaintiff will not further press this particular request.

PLAINTIFF'S PARAGRAPH (7): "A document identified by Barry Lando as a CBS memorandum on the subject matter of a request from the attorney for Col. J. Ross Franklin to obtain CBS' cooperation in providing information in connection with a possible lawsuit against Col. Herbert, and questions concerning that memorandum."

HEWITT:

P. 109-113. You indicated to us that you would advise us of the list of addressees to whom the subject memorandum was circulated. We will request the Court to conduct an *in camera* inspection of the memorandum. If the memorandum is thereafter produced, we will have certain questions to ask. You have indicated you will bring the memorandum with you to Court on July 21, 1976.

*Letter, Dated July 19, 1976, From Plaintiff's Counsel to
Counsel for Defendants Wallace and CBS*

PLAINTIFF'S PARAGRAPH (8): "Documents in the possession of CBS, its agents, representatives or employees, during the period from June, 1971 to February 4, 1973 regarding (a) Col. Herbert, (b) war crimes, (c) conduct of the 173d Airborne Brigade in Vietnam, (d) individuals appearing or referred to on the '60 Minutes' segment, or (e) events set forth in *Soldier*."

You have advised us that you have produced all documents in the possession of Mike Wallace and CBS gathered or generated during the research, preparation and broadcast of the '60 Minutes' segment on Col. Herbert relevant to the matters set forth in Paragraph 8. At our conference you further advised us that CBS and Wallace had produced all documents in CBS' possession that Wallace and Lando knew of at the time the program was being researched, prepared and broadcast relevant to the matters set forth in paragraph 8. We will continue to seek the production of all documents in the possession of CBS, its agents, representatives or employees during the period from June 1, 1971 to February 4, 1973, regarding Col. Herbert, the 173d Airborne Brigade while in Vietnam, individuals appearing or referred to on the '60 Minutes' segment and events described in *Soldier*. In this connection, we are willing to restrict the document requests to documents in the possession of CBS News, as distinguished from the entire CBS corporate entity.

PLAINTIFF'S PARAGRAPH (9): "Documents relating to correspondence or communications between Wallace and/or employees of CBS and (a) Gerald McCauley, plaintiff's agent, (b) James Wooten, plaintiff's co-author of *Soldier*, (c) Holt Rinehart & Winston, publisher of *Soldier*, and (d) employees or representatives of Atlantic Monthly concerning Col. Herbert, his charges, and/or the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon."

*Letter, Dated July 19, 1976, From Plaintiff's Counsel to
Counsel for Defendants Wallace and CBS*

Similar to plaintiff's paragraph 8, you have advised us that all documents in the possession of Mike Wallace and/or CBS which were acquired or generated in connection with the research, preparation and broadcast of the '60 Minutes' segment relevant to the matters set forth in paragraph 9 have been produced. Included in such documents, you have further advised us, are all documents prepared and were known to Wallace and Lando at that time. We will continue to seek the production of any other documents which were in the possession of Mike Wallace and/or CBS during the time the program was being prepared and which are relevant to the matters set forth in paragraph 9, whether or not Wallace or Lando had specific knowledge of such documents at that time.

PLAINTIFF'S PARAGRAPH (11): "Documents relating to communications between employees of CBS and employees of Holt Rinehart & Winston concerning royalty payments to plaintiff or James Wooten in connection with *Soldier*."

You have advised us that CBS will produce correspondence, memoranda and telephone logs, if any exist, relating to or concerning the payment of royalties or advances. With the completion of this matter, we will not further pursue the request for other documents under this paragraph.

In connection with areas concerning communications, etc. between the White House Staff and CBS officials concerning CBS' presentation of news of the Vietnam war and war crimes, we note that facts have come to light over the last three years about substantial pressure on CBS, as well as other media, to present a certain particular viewpoint on those issues. According to former White House officials and other sources familiar with activities during

*Letter, Dated July 19, 1976, From Plaintiff's Counsel to
Counsel for Defendants Wallace and CBS*

the Presidency of Richard M. Nixon, such pressure occurred in specific conversations with CBS officials, involved those particular subjects and resulted in programming changes. We believe such information is relevant to the motive of CBS in presenting the segment on Colonel Herbert—with its distortions and deliberate exclusion of material facts.

We hope that you will reconsider the position of Wallace and CBS and be able to further narrow the areas of dispute.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN
& LUBELL

s/ Johathan W. Lubell

JWL:mf
BY HAND

cc: Honorable Charles S. Haight, Jr.
United States District Judge
U. S. Courthouse
Chambers, Room 2904
Foley Square
New York, N.Y. 10007 BY HAND

Richard G. Green, Esq.
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1270 Avenue of the Americas
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Charles Rembar, Esq.
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New York, New York

**Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ANTHONY HERBERT,

Plaintiff,

vs.

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, Inc., and ATLANTIC MONTHLY COMPANY,

Defendants.

74 Civ. 434

Before:

HON. CHARLES S. HAIGHT, JR.,

District Judge.

New York, July 21, 1976;
9.30 o'clock a.m.

APPEARANCES:

COHEN, GLICKSTEIN, LURIE, OSTRIN & LUBELL, Esqs., Attorneys for Plaintiff, 1370 Avenue of the Americas, New York, N. Y., BY: DAVID J. LUBELL, Esq., and MS. MARY K. O'MELVENY, Of Counsel.

GREEN & HILLMAN, Esqs., Attorneys for Defendant Lando, 1270 Avenue of the Americas, New York, N. Y., BY: RICHARD G. GREEN, Esq., Of Counsel.

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

(2) COUDERT BROS., Esqs., Attorneys for Defendant Wallace, 200 Park Avenue, New York, N. Y., BY: E. G. ELDRIDGE, JR., Esq., and PAUL JONES, Esq., Of Counsel.

W. MALLORY RINTOUL, Esq., Attorney for Defendant, Columbia, 51 West 52nd Street, New York, N. Y.

REMBAR, WOLF & CURTIS, Esqs., Attorneys for Defendant, Atlantic, 19 West 44th Street, New York, N. Y., BY: FRANK CURTIS, Esq., Of Counsel.

(3) (Case called.)

MR. LUBELL: Plaintiff is ready.

THE CLERK: All sides are ready, your Honor.

THE COURT: All right.

Now, ladies and gentlemen, we have a limited amount of time available to us today, because I have to resume a jury trial at about 10:15, but it seemed to me it might be useful to have this session today and perhaps work out some guidelines, or at least I can receive some further guidance from you.

I have read the exchange of correspondence among counsel on disputed discovery matters, and it seemed to me that was a helpful exercise.

Let me just indicate some of the questions and areas of concern that I have, in no particular order, and we can talk about them, and this hearing today may give rise to rulings on certain general areas of discovery.

I may also indicate the necessary for further briefs or authorities.

Let me start with the general area of privilege.

As I understand the papers, there are two claims of privilege that are made. The first relates (4) to the journalist's privilege, as contained in the New York civil rights statute, and I gather that in that context Mr. Wallace resists answering questions about some of his discussions and contacts with people at the Pentagon; is that so?

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

MR. LUBELL: Yes, your Honor.

THE COURT: All right. The difficulty I have with the New York civil rights statute is that it appears to address the question of whether someone who refuses to answer can be punished by contempt, either by the Court or in connection with a grand jury indictment.

The purpose of that statute as to what is presented here troubles me somewhat. If I conclude that the particular question or questions that we are concerned with are proper subjects of pretrial discovery and direct Mr. Wallace to answer and he does not do so, there is no question of contempt that necessarily arises. I can simply strike the defendant's answer for failure to comply with the discovery order. There is no contempt proceeding. No one goes to prison. Some money may change hands shortly thereafter, but I have a little difficulty understanding the applicability of the New York no-contempt proceeding statute to this particular case. Can someone enlighten me on that?

(5) Who appears for Mr. Wallace?

MR. ELDRIDGE: I do, sir. I am Mr. Eldridge.

THE COURT: All right, Mr. Eldridge.

MR. ELDRIDGE: Well, basically, Judge, historically speaking, my understanding of the statute was that in cases prior to the legislative enactment the Court, when a reporter on a constitutional basis, felt that he did not have to disclose the source from whence he obtained certain information in his news gathering activity, normally in various jurisdictions there have been cases which went one way or the other depending on the particular case.

For example, in criminal cases the privilege has been struck down more frequently than in civil cases, with the balance of society's need for the information in mind, as I would presume.

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

In the case where a reporter in a civil case has failed to respond and the Court felt a response was indicated and so directed, the reporter was customarily given time to consider what position he would take now in face of a Court directive. If he responded in the negative, as Torre did at one time, why, then, the Court exercised its contempt powers and directed either a fine or incarceration, subject to the witness responding to (6) the question.

THE COURT: Now, Torre was a libel case, was it not?

MR. ELDRIDGE: Yes, your Honor.

THE COURT: Was Miss Torre a party or a defendant in that case?

MR. ELDRIDGE: No. She was a witness.

THE COURT: Well, isn't that a significant difference in this case? Mr. Wallace is a party defendant. If—

MR. ELDRIDGE: I was just getting into the historical background. I mentioned Torre as an example that occurred in this court.

Beginning with the basis of the background, the legislators in their wisdom felt if a contempt in this question of privilege was not a desirable result in terms of First Amendment freedoms the result was that they took away a judicial power. Now, they do not, and I think you are correct, take away any powers that the Court would otherwise have. That is the basis of our raising the question of privilege.

When we do, we base it on our First Amendment constitutional rights, which in our judgment may be broader than the statute in its narrow legislative accomplishment. (7) That is the historical concept of my understanding of the New York statute.

THE COURT: Well, to evaluate the First Amendment constitutional right problem, I suppose I am required to enter into a balancing process. That is what the cases indicate to me from my first examination of them. On the

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

one hand, the availability of this information, or this material, is relevant, to the plaintiff through other sources; on the other hand, the purpose of preserving the reporter's confidentiality.

I think that on the question of privilege I am going to require briefs from counsel. I understand the positions. That appears from the letter. But I would appreciate memoranda of law on the confidentiality question, based upon the New York statute or the Federal statute or anything else, in respect to those questions, where Mr. Wallace declines to answer on the basis of privilege.

MR. ELDRIDGE: There is only one.

MR. GREEN: There is only one question.

THE COURT: Only one question?

MR. LUBELL: That is right.

THE COURT: Well, it could lead—

MR. LUBELL: We were cut off in the course of (8) the examination, and we weren't going to make a lot of objections.

MR. ELDRIDGE: It is a question of the sources of information, Judge.

THE COURT: It is in the Wallace deposition, that particular question, isn't it? Which page is that?

MS. O'MELVENY: Page 226.

THE COURT: Yes. The question appears to be:

"Q. Could you identify to us who the Pentagon people were who speculated that the reason the Generals didn't want to talk was because of so many true stories of war crimes?"

That is the question at issue, tied up with the question of privilege, the journalist's First Amendment right.

All right. I would appreciate memoranda of law directed to the privilege question that arises out of that question.

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

Now, on the attorney-client privilege, I am a little puzzled by that claim of privilege as it relates to the Col. Franklin memorandum. I may not fully understand what is going on there, but, as I understand it, there is in existence a memorandum referring to some of (9) Col. Franklin's communications looking towards possible joining in litigation with CBS.

What I don't understand is which attorney is involved in the attorney-client privilege that is asserted in connection with that memorandum and which client. Can someone enlighten me on that?

MR. ELDRIDGE: Well, perhaps we can address it jointly.

THE COURT: Yes.

MR. ELDRIDGE: It comes up, if my chronology is correct, shortly after Col. Franklin instituted, independent of this litigation, a lawsuit against Reinhart & Winston, relating to a book authored by Jim Wooten as told to Tony Herbert, which is a CBS subsidiary, and a letter from Col. Franklin's lawyer came to Barry Lando, a CBS employee.

MR. GREEN: A letter or a request. I'm not sure.

MR. ELDRIDGE: Barry Lando turned it over to the CBS Law Department for advice. The Law Department memorandum is from the CBS Law Department to people in the News Department and Barry Lando and several other members of the Law Department of CBS who are interested in litigation and general matters, including the assistant (10) general counsel, giving him advice as to what he should do in terms of the letter or request from Col. Franklin's lawyer which preceded a lawsuit which Col. Franklin did in fact file against Reinhart & Winston.

It is a memorandum dated July 17, 1973, written by Michael Golde to people I have noted. Michael Golde was at that time a member of the News Department, and the memorandum was advising the news people.

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

It is the position of CBS that this is a privileged document in terms of advice given by lawyers in connection with a matter arising from the outside, where the member of the News Department sought the legal advice as to what to do, from the Law Department.

THE COURT: And the memorandum in question is not the communication from Col. Franklin to Mr. Lando. What we are talking about is the responsive memorandum prepared by CBS.

MR. ELDRIDGE: The memorandum upon privilege is claimed is the letter written by Mr. Golde to CBS news people, including Mr. Lando and the assistant general counsel.

THE COURT: Why isn't that privileged, Mr. Lubell?

MR. LUBELL: First of all, the letter from (11) Col. Franklin's lawyer to Mr. Lando—

MR. ELDRIDGE: The memo?

MR. LUBELL: —from Col. Franklin's lawyer to Mr. Lando has never been produced.

Mr. GREEN: I have never seen the letter before. I presume it was turned over—

MR. ELDRIDGE: We wouldn't be claiming privilege as to this. It may be that the two were attached together. You can't claim privilege on Col. Franklin's letter to Mr. Lando.

THE COURT: Yes. I agree with that.

MR. LUBELL: This is the first I have heard of a document. I am just pointing that out. I thought it might be a telephone communication.

MR. ELDRIDGE: He would have had a conversation possibly with the Law Department.

MR. LUBELL: Insofar as the memorandum itself is concerned, the legal memorandum, that is, the memorandum received from the CBS legal staff, we believe there is an

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

area where in a libel case such communications are prudicible, are discoverable. We had requested at this hearing to have some clarification as to the memorandum in order to argue about this further, as to who the addressee was, who were the people receiving it, and (12) it still isn't clear when Mr. Eldridge says "The CBS news people"—it still is not clear to us who that is, whether that is "Sixty Minutes" or beyond "Sixty Minutes" or where the memorandum was disseminated, and I would like to know that information, and I think I would like to have an opportunity to brief the area where there is an exception to the confidential communication protection between attorney and client in libel cases because of the particular importance of those communications in terms of the publisher, or the one who publishes the alleged libel, as to his knowledge or belief that he has as to the falsity or truth of what he ultimately publishes.

THE COURT: Yes. I think that this question should be briefed also within the general context of privilege.

Now, let me turn to some other general subjects.

What I have tried to do—

MR. CURTIS: Your Honor, there is also a question of attorney-client privilege involved in the open questions involving the defendant Atlantic, and maybe we should deal with those if we are going to cover the question.

THE COURT: On Atlantic, all right. I see. (13) What is at issue there?

MR. CURTIS: What is at issue are communications between the editorial personnel at Atlantic and their regular counsel concerning the article prior to and subsequent to its publication.

THE COURT: Is there an outstanding demand for discovery in that area?

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

MR. LUBELL: Yes; there is. The chronology of this is that there was an original communication, telephone communication, that he has testified to by the Atlantic people to their attorney out in Boston. He sent a letter. A copy of that letter was sent to Barry Lando. That letter was produced.

There is also testimony that there was subsequent communication or subsequent communications in those areas, subsequent communications between the Atlantic people and their attorney, which are different from the original communications, and I think that should be read within the whole privilege area.

THE COURT: Yes. I would be grateful if you would address that whole privilege area, Mr. Curtis. I simply hadn't been aware of that.

Now, in looking through the letters, I perceive another general area of inquiry, and that has to do with (14) the defendants' refusal up until now to answer questions on depositions concerning the usual procedure followed by CBS in producing segments of "Sixty Minutes". Am I correct in thinking that this is an area of controversy?

MR. LUBELL: I believe so, your Honor.

THE COURT: What do you mean by "usual procedure", Mr. Lubell? In what particular respect?

Mr. LUBELL: What we mean in particular is that there are certain things testified to by Mr. Lando as to the procedures he adopted in preparing this particular segment. What we were trying to understand was whether this was consistent with the usual procedure or inconsistent with the usual procedure, based upon the concept that evidence of custom and usage, evidence of practice, evidence of habit are admissible circumstantial evidence from which inferences can be drawn in a number of different contexts, and in this context inferences can be drawn as to whether this was done recklessly, whether

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

there was some unusual situation, unusual motivation that resulted in certain procedures being followed.

For example, one thing in particular I might point out is that there was a second filmed interview done of Col. Franklin, which Mike Wallace and everybody else in CBS testified they had no recollection of knowing (15) about at that time. We wanted to find out what the usual procedure was in regard to doing a second filmed interview. We were cut off at that point.

Obviously, our questions would have been on the subject of whether a second film would be usual to discuss with Mike Wallace or the supervisor who was putting on the program, to have a second interview.

All those circumstances never came out, and we believe that those areas are permissible areas of discovery, that they can lead to admissible evidence, and they can lead to circumstantial evidence from which inferences can be drawn.

That is our opinion under the procedures and practices.

THE COURT: Well, you know, Mr. Eldridge, I have a certain sympathy with that approach. The plaintiff has a difficult burden here, but what he is eventually going to ask the jury to do, I suppose, is to draw inferences from the evidence either of malice or reckless disregard.

Now, perhaps particularly with respect to reckless disregard, although not necessarily limited to that, it does seem to me it is pertinent to inquire as to the usual practices and procedures in preparing one of (16) these programs and then contrasting those practices or procedures, whatever they may be, with the practices and procedures that were followed in respect of Col. Herbert, because out of that contrast, if one is established, the seeds of an inference of either malice or careless disregard may grow; but we really can't tell unless we know what the other practices are.

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

I confess I have a certain sympathy with the plaintiff on this aspect of it.

MR. ELDRIDGE: Well, Judge, I think when one focuses upon the issue to which plaintiff's counsel is addressing himself and which the Court has raised, we are dealing with the "actual malice" issue, which relates to the question of whether or not the defendant published a calculated falsehood or whether he entertained serious doubts as to truth. That is the definition of reckless disregard.

That makes the test a subjective test in terms of the state of mind of the defendant, not an objective test, as the Courts have more recently suggested in their language, and therefore, if I may, just with a sideline story, in the handling of a case from South Dakota involving the First Amendment, the chief Judge of the District Court there, faced with the problem of NBC's (17) practices, said, to plaintiff's counsel, "Well, tell me how different would it be if NBC had a rule that truckdrivers of a trucking company had a rule that the drivers should never exceed the limit of forty miles an hour wherever they drive, and there is an accident that occurs on a super-speed highway, where the driver is driving within the prescribed limit of, say, sixty-five, and an accident occurs, and then you offer to the jury that NBC or the trucking company in the example prescribed in their rules that their drivers shall never exceed forty miles an hour."

Now, a jury should not be using the exhortative standards that the defendant might choose to use in measuring liability under the law, because he was not in fact speeding, and in fact to hand the jury, as the Chief Judge said to plaintiff's counsel, to hand these exhortatory rules that the trucking company would prescribe for their drivers would be unfair under the circumstances, and he refused to allow the introduction into evidence of NBC News' rules and practices in a similar type case on an actual malice issue.

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

Now, I think that story I tell is merely illustrative of how his thinking was, and I submit it was correct and his ruling is correct.

(18) THE COURT: Is that a reported case?

MR. ELDRIDGE: Well, it occurs in the transcript, yes. It is Barry against NBC. My recollection is that the colloquy may be in the transcript. It occurred in chambers.

The case is a reported case, yes, the trial result and the appellate result.

THE COURT: But even assuming, even accepting the subjective as opposed to the objective test, I still don't see where certain inferences could not be drawn on the subjective test from an examination of practices and procedures.

Let me give you a hypothetical, somewhat closer to home than the truckdriver.

We have a read a lot about the Woodward and Bernstein practice of never printing anything unless they have it corroborated by at least two independent sources. Now, just assume for the sake of the argument that discovery would indicate, in respect of the preparation of the "Sixty Minutes" program, that such a practice or something like it was followed, and suppose it should also develop that in respect of the program on Col. Herbert, such a practice was entirely departed from.

MR. ELDRIDGE: They only had one, you mean, (19) one source in your hypothetical, as opposed to two?

THE COURT: Yes, or something along that line, that there was a practice or procedure in respect of the verification of information which was generally followed in the other programs but in a rather dramatic fashion was departed from on the Col. Herbert program.

I am not suggesting for a minute that is so. We are dealing in hypotheticals.

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

But if such evidence was developed, couldn't an inference be drawn from that contrast with respect to the subjective frame of mind of the people who were putting the program together?

MR. ELDRIDGE: The trouble I find with that, Judge, is that that is not too different—your example is not too different from the forty miles an hour that the trucking company might prescribe.

Now, the Courts have said that, for example, one source for a piece of information is more than adequate. There is no duty to go out and investigate beyond. Now, if you have a bona fide source for a piece of factual information, as we can only deal with published facts, I think that is made absolutely clear now, so if you have that, the Court would say that the plaintiff had not carried his burden of proving by clear (20) and convincing evidence that the defendant had published a calculated falsehood or there was a reckless disregard for the truth because he only had one source.

Now, the publisher, because he liked to be overly cautious in his approach, because he doesn't like to be sued, suggested in this case that we ought to have two sources. To let the jury know that he requires his people to go beyond what is prescribed by the law and then to permit them to speculate as to whether or not he should be punished because he asked that they go beyond what is required by the law I submit would be highly unfair in this area of First Amendment freedoms and under a subjective test. This jury could only find an award against this defendant if they have transcended and abused their First Amendment privilege, and the mere fact that a publisher places higher requirements upon those responsible for publication should not militate against his First Amendment rights, and that is what this plaintiff wants to do.

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

THE COURT: How about the plaintiff's argument that Col. Herbert was put into a very little, wretched room, with bright lights, was made to squint and look dreadful during the actual telecast?

MR. ELDRIDGE: That is the very same room (21) where people were interviewed day after day, and this was the subject of factual testimony. You can ask how many interviews were conducted in that room regularly. I have no objection to that. That has nothing to do with your practices relating to source information.

THE COURT: Well, practices and procedures I suppose would include the physical arrangements.

MR. ELDRIDGE: Whether or not he was placed in a room which had never been used for interviews would have something to do with it, but I don't find that it equates with the type of question that we are talking about, and you and I were talking about the standard involved to defeat his First Amendment privilege.

If the Court likes, we certainly can supply cases to support this thesis. It is not a difficult one, and I think it is rather well established.

THE COURT: Yes, Mr. Lubell?

MR. LUBELL: First of all, I believe that in this Circuit, private safety regulations and rules are admissible for circumstantial evidence from which negligence, for example, or carelessness can be inferred, and I refer to the decision in this Court in *Universe*, 152 Fed. Supp. 903, which in turn discusses a number of other cases, so the question of whether a rule or regulation (22) of the defendant is admissible in this Circuit I think is fairly well established, that it is admissible.

I think that Mr. Eldridge's argument is that that rule is not a standard of safety but a standard of over-caution. He assumes a state of facts which leads to a particular answer.

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

I might also indicate that one of the areas of practice, one of the specific areas of practice that we wanted to find out about had to do with the reversal of questions and answers.

THE COURT: Of what?

MR. LUBELL: In the deposition of Mr. Lando, we found that he had changed the order of certain questions and answers that he had posed to Col. Franklin during his interview, filmed interview, changed it when aired on the "Sixty Minutes" segment. We found out that he had specifically called Col. Franklin and asked Col. Franklin's permission to do this on January 30th, a few days after the program went on the air.

In regard to Col. Herbert, the interview Mike Wallace did of Colonel Herbert, Colonel Herbert made a statement at the very beginning of that interview. That statement is placed at the very end of that "Sixty Minutes" program.

(23) Now, we contend that these are reversals of order.

We have found out recently that after the *Selling of the Pentagon* program and prior to the preparation of this program, CBS promulgated specific guidelines on the reversal of questions and answers, and we do not have those, and those are types of practices.

We want to know what they did here, whether what they did here was consistent with those guidelines. If not, we want to find out something else about it, and I think we have a right to that.

Those are facts as to how this program was produced, from which various inferences concerning the question of malice, that is, knowledge of falsehood or reckless disregard to whether it was true or false, can be drawn, and I think we are entitled to that.

THE COURT: All right.

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

I will rule that plaintiffs are entitled to inquire into the general subject of usual procedures followed by CBS in producing segments of "Sixty Minutes". That is all I will say at this time. I will leave it to counsel to implement the Court's ruling, because there isn't time to deal with each particular question, but you must be guided by that general ruling, and if (24) particular problems arise with respect to particular questions, there will have to be further applications.

Another general subject appears to be a request by the plaintiffs for full disclosure concerning communications between the defendants and what is referred to as the Nixon White House on a number of subjects.

Now, the first subject is Col. Herbert, but then, as I understand the papers, that particular subject is then expanded to include the following: CBS war coverage in general; CBS coverage of war crimes and the bias by the Nixon administration or the White House staff against the news media in general or CBS in particular.

Now, I understand that there has been compliance with respect to the first subject, namely, communications between the defendants and the White House staff or personnel with respect to Col. Herbert. The objection that is made to the rest of it, Mr. Lubell, is that this is not possible to comply with. What do you have to say to that?

MR. LUBELL: If I might just focus on why we thought the question was proper, what we were trying to understand was the factual circumstances that existed in the presentation of programs by CBS at that time, particularly news programs regarding the Vietnam War and war (25) crimes and the facts which have come out over the last several years regarding a consistent pressure by staff members of the White House on CBS as well as other media regarding the presentation of programs on those particular subjects and what has come out very

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

recently, according to Mr. Colson, at least, in a communication between Frank Stanton of CBS and Colson regarding presentation of CBS programs on the war and war crimes.

We wanted to ascertain what was the course of discussion, what happened in the relationship between the White House and CBS in the presentation of those programs, did what happened result in a motivation by CBS to present a program that conformed to the White House's view of the war or of war crimes, was there pressure on CBS to slant a program? Were they motivated by reason of their motivation with regard to licenses et cetera to present a program in a particular light, and on the questions of motivation, the inferences of motivation are the areas that we are after in terms of these communications.

We do know that there were communications between the White House and CBS regarding programs on the war and everything else. We know that from matters that came out during the Watergate-related investigations. (26) We do not know anything much more specifically, and if we were able to inquire from there to the specific situation, I think we would be able to determine whether in fact there was motivation to put on a program that presented a certain view of war crimes, a certain view that presented the Pentagon's view of this situation, and that is what we were after.

If we are too broad on that, maybe we can redefine it, but I'm not sure whether we can be more specific.

I have expressed what our intention is to counsel for the defendant and expressed it to the Court, hoping that it could be narrowed so as to come within those borders, but I think we have a right to try to ascertain whether in fact there was a situation that existed, an unfortunate situation which existed which did result in a particular motivation or a particular intention by CBS to put on

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

a particular program of a particular position, and I might add that one of the interesting side notes is that the Selling of the Pentagon was the trigger for various communications between the White House and CBS and the trigger for this particular program was the interview of Col. Herbert.

THE COURT: What you mean to say is that (27) communications with respect to Col. Herbert don't give you all you need, necessarily, because out of all the general communications and statements made by the White House a foundation may be laid for the drawing of an inference that the defendants did what they did to Col. Herbert in order to try to placate some of these more general expressions of concern or pressure from the White House.

Is that what it comes down to?

MR. LUBELL: General concern and pressures from the White House specifically in the area of the Vietnam War and war crimes.

According to a number of sources, in fact, CBS did make programming changes after the Selling of the Pentagon.

THE COURT: It seems to me both broad and speculative.

What do you say, Mr. Eldridge?

MR. ELDRIDGE: Judge, I wouldn't know how to start such an investigation in terms of CBS news along, coverage of the Vietnam War or coverage of general areas.

We allowed him to ask questions about Col. Tony Herbert, and he asked questions in terms of communications between the White House and the Pentagon and (28) what-have-you, and the answer is no.

Now, he reads in the newspapers, as people do, what might be on the White House tapes, what communications might have occurred, and now he wants to go beyond the News Department and examine executive personnel, possibly former White House staff, in terms of communications that might have occurred, but not Col. Herbert.

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

When we restrict it to Col. Herbert, that is not enough. Now, this case involves Col. Herbert, and the program even has his name in the program.

The Selling of the Pentagon, as the Court may remember, years before, related to a Congressional investigation of whether Frank Stanton, then president of CBS, should be cited for contempt. Nothing was done on it.

Now, all the information we now have—and I point out particularly, those responsible for the publication are the critical people involved—he has examined those people at CBS, and he has gained from them all of the information we had or knew about or sources we communicated with, prior to the publication of this program.

Now, to go off on this tangent, particularly (29) in an area that makes it impossible for us to do our own discovery in the broad, general areas of war coverage et cetera—I couldn't even make an estimate of the amount of news coverage the Vietnamese War had on CBS and other networks and what kind of communications, whether the gentlemen at the White House might have called and said, "You're showing an awful lot of blood in terms of the coverage of the Vietnamese War."

Well, he wants to go into questions about that, and I fail to see where that could lead to any discoverable evidence. It is just harassment of the defendant, because we have no way of going back to the files on the Vietnamese War to find that.

This should be related to Tony Herbert, and we have not prohibited his discovery in that area.

I might note that this Circuit just recently, on this Buckley case, which was decided June 30, 1976, in this Circuit, noted on the question of actual malice—4611, the slip opinion—repeatedly the Court has said, "The ill will towards the plaintiff, bad motive, hatred, spite, a desire to injure are not the kind of malice that the Sullivan against New York Times case comprehends."

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

I would submit even such motive in terms of the most recent Second Circuit ruling would not lead to (30) the discovery of relevant evidence under the malice test, even if you compare the thesis of his argument to the logical conclusion and forget the problems we have in regard to the defense.

THE COURT: I am going to limit the plaintiffs on this subject of communications to communications between them and the White House relating to Col. Herbert. It seems to me that to go as far afield as the plaintiffs are attempting to go is much too broad, goes too far afield, and the potential probative value of such inquiries is not sufficiently significant in my judgment to warrant that expanded inquiry.

So, again, I will leave it to counsel to implement that general ruling.

Another area that appears to arise is questions which the defendants have refused to answer with respect to expenses incurred by CBS or its employees in preparing the "Sixty Minutes" segment.

I will rule that questions relating to expenses can and should be answered, but I will restrict the subject of expenses to the expenses of the actual reporters who were involved and those working under them in the gathering of facts for broadcast. This is to say, I don't see any significance or importance with respect to (31) charges for cameramen or stagehands or things of that nature.

It is my view that an examination of the expenses incurred in the actual threshing of the wheat which appeared in the program, particularly when contrasted or viewed within the context of customary procedures for this program, which I have also ruled are a proper subject of discovery, may lead to admissible evidence.

MR. ELDRIDGE: May I have a moment on that subject?

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

Our problem is a logistical problem. We don't keep expenses in terms of program segments. I don't know how we are going to find Barry Lando's individual expenses in terms of the segment which is the subject of the libel suit.

THE COURT: Well, if as a practical matter—

MR. ELDRIDGE: That is our problem.

THE COURT: If it simply can't be answered, that is a sufficient answer under the rules. I am addressing myself to the propriety of the field of inquiry.

MR. ELDRIDGE: Well, you could conceivably direct the staff to search CBS's news expenses for a year to find Lando's records, but you can't go to a (32) segment here and pick out the expense items. I don't know where we would go to do this. That is what we are urging, that it is an impossible job, where the company doesn't keep its vouchers on a reporter's trip, say, from here to Washington, in terms of a particular segment.

THE COURT: Well, I may have misunderstood. I got the impression from the papers that the objection was one more of irrelevance than of practical impossibility. If it can't be answered, it is a sufficient answer to say so.

MR. ELDRIDGE: I don't know how you could direct it unless you contemplate an overbearing examination of our expense records.

THE COURT: I limit my direction to one which is to the effect that inquiries into expenses incurred with respect to this particular segment are a legitimate field of inquiry. That is all I am saying at this time. If at a subsequent time you interpose answers along the lines of what you have just said, Mr. Eldridge, then the sufficiency of those answers can be tested.

Another field of controversy—and perhaps this is all we can cover this morning—has to do with timing, as I understand it.

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

Let me see if I can pinpoint that. I understand (33) it to be an area of dispute as to whether the defendants are obliged to produce documents—yes; it is a general inquiry, as I understand it, for the production of documents or the asking of questions regarding communications between CBS and Wallace and any individual appearing on the broadcast, which may have taken place subsequent to the segment's airing on television.

I understand that defendants' position is that they must produce and have produced all relevant documents in this category created prior to the broadcast but that they are not obliged to produce such documents or communications which took place after the broadcast.

Have I correctly characterized the area of disagreement?

MR. ELDRIDGE: As I understand, in the area to which you are addressing yourself, I believe our position was that in terms of the actual malice test, which is what this line of inquiry goes into, the test is whether or not the defendants charged with responsibility for the publication at the time of the broadcast published a calculated falsehood or entertained serious doubts as to the truth.

Now, to ask what kind of information came to their attention or questions or discussions, assuming they (34) are not privileged, or something after the claim is filed, what communications they had after that to me would not be probative of the state of mind of the defendants at the time of publication.

THE COURT: But how about the reckless disregard of the truth? Isn't that a possible basis of liability in this case? We don't have, it seems to me, a hot news situation. Therefore, under the law, it seems to me, as I understand it, a possible avenue of liability is a complete or total or reckless disregard of truth or accuracy. Isn't that so?

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

MR. ELDRIDGE: Judge, you will look long and hard on a hot news issue to find a case which holds to the plaintiffs entitled to that.

Indeed, if you took all the magazine cases, which have considerable lead time—and many of those cases made considerable law—and you match them against all the broadcast cases of daily broadcasting or such as Berry, which is, you know, a journalistic venture, which has considerable lead time, you will find the rule of law is identical in each case.

There is no case which says whether you have a short lead time or a long lead time the rule of law will (35) change, and indeed, with respect to reckless disregard, I submit that the St. Amant case clearly, in the Supreme Court, said that by reckless disregard for truth we mean did the defendant entertain serious doubts as to the truth, meaning those responsible for the publication.

Now, that has been refined to be a subjective test, so it is no longer and it never has been, as I understand St. Amant, a super-negligence test. It just isn't that. And therefore, if you focus on what the actual malice test is, it is the subjective state of mind with respect to the knowledge of the defendant at the time he communicates to third parties or publishes, and when you go beyond that, you are just wasting your time. Anything that he learns after that will not play a part in what his state of mind was when he went to press, because that is the critical time, and that alone, and that is the point of our basic objection of getting into all the communications that may or may not have been had, inside or outside of the publishing house.

THE COURT: All right. I want a brief on that. Include that in your brief, please, both parties.

I confess I would have thought that post-broadcast communications might have led to evidence which could

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

then support an inference as to pre-broadcast state (36) of mind, but I understand what you are saying to me, Mr. Eldridge.

I prefer not to decide this particular aspect of the case until it is further briefed, and I think it is important that we do so at this time, because it goes very close to the bone.

It seems to me that the parameters of discovery are going to have a great deal to do with whether or not the plaintiff can sustain the burden which he has in the case, and therefore it seems to me it is a useful exercise for all of us to consider the discovery questions with considerable care and to brief these disputed areas on the law at this time.

I know it is going to be helpful to me in a situation where the plaintiff must essentially prove someone else's state of mind.

It does seem to me that discover is a most significant part of the case. I think it is out of the seeds of discovery—perhaps more so in this situation than in most situations—that out of those acorns the plaintiff's oak is either going to grow or not.

I wish I could continue this dialogue, but I can't.

I must get on to my jury trial.

(37) I have made certain specific rulings. I have asked for briefs on others. I am aware that I have not touched all of the disputed areas in the discovery field. Therefore, counsel may address any additional questions that they wish in their briefs, and I think that main briefs on discovery questions should be filed and exchanged within a reasonable period of time.

What would counsel suggest on that? I will get to it as soon as I have the briefs or as soon as I can thereafter, but what I have in mind is a fairly elaborate briefing on discovery issues, because it seems to me the questions are important for the reasons I have suggested,

*Transcript of Proceedings Before Hon. Charles S.
Haight, Jr., Dated July 21, 1976*

and I would welcome main briefs and reply briefs on discovery issues.

MR. LUBELL: Maybe the best thing is for counsel to discuss it among themselves.

THE COURT: Yes. Why don't you work out a schedule on that?

MR. ELDRIDGE: The only thing is that certain people I know are going to have vacations.

THE COURT: I understand. I won't put any pressure on counsel as to that. I think that is something you can work out yourselves, but I feel that I need further guidance on this and other areas, and I would be grateful for any help you can give me on that.

**Letter, Dated July 22, 1976, From Plaintiff's Counsel
to Counsel for All Defendants**

LAW OFFICES
 COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL
 1370 Avenue of the Americas
 New York, N. Y. 10019

July 22, 1976

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 200 Park Avenue
 New York, New York 10017

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 New York, New York 10020

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 Rembar, Wolf & Curtis
 19 West 44th Street
 New York, New York

*Letter, Dated July 22, 1976, From Plaintiff's Counsel to
Counsel for All Defendants*

Re: *Herbert v. Lando, et al.*
 Dear Messrs. Eldridge, Green & Curtis:

Following the discussion with counsel yesterday morning concerning the most convenient date for briefs from the parties on outstanding discovery disputes, I spoke with Judge Haight's law secretary, Mr. Schlessinger, about an exchange of main briefs on September 15, and an exchange of reply briefs on September 30. These dates are acceptable to Judge Haight.

In addition to those specific areas upon which the Judge has requested briefing by the parties, plaintiff will raise all remaining open issues set forth in our exchange of correspondence not disposed of by the Judge's rulings on July 21, 1976. If defendants determine that some of these disputed areas can be further reduced, we would appreciate being so advised as soon as possible.

Very truly yours,
 COHN, GLICKSTEIN, LURIE, OSTRIN
 & LUBELL

MARY K. O'MELVENY
 MKO'M:lle

cc: Honorable Charles S. Haight, Jr.
 United States District Judge
 U. S. Courthouse
 Chambers, Room 2904
 Foley Square
 New York, New York 10007

**Affidavit in Support of Plaintiff's Motion to Compel
Discovery**

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

ANTHONY HERBERT,

Plaintiff,

against

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING
SYSTEM, Inc., and ATLANTIC MONTHLY COMPANY,

Defendants.

Civil Action No. 74 Civ. 434 (CSH)

STATE OF NEW YORK,
COUNTY OF NEW YORK, SS.

JONATHAN W. LUBELL, being duly sworn, deposes
and says:

1. I am a partner in the law firm of Cohn, Glickstein, Lurie, Ostrin & Lubell, the attorneys for plaintiff. This affidavit is made in connection with plaintiff's motion under Rule 37, FRCP, to compel discovery.

2. The motion involves unanswered questions posed to defendants Lando and Wallace, to defendant CBS by Donald Hewitt and William Leonard and defendant Atlantic Monthly by Robert Manning and Richard Todd. In addition, various document demands addressed to Lando, CBS and Wallace, and Atlantic Monthly are also in issue. While the questions and document demands involve four different defendants and six witnesses, the legal issues raised by the objections thereto fall into certain definable

*Affidavit in Support of Plaintiff's Motion to Compel
Discovery*

areas which cut across the parties and witnesses. These legal issues are discussed in the accompanying Memorandum of Law. Set forth below are listings of the open questions and demands keyed to the points discussed in the Memorandum of Law.

A. Questions and Demands involving State of Mind—Conclusions, Intent, Motive. (POINT ONE of Memorandum)

1. Whether conclusion was reached by witness as to particular matter

- p. 666 1. 20-22*
- p. 774 1. 5-7
- p. 1486 1. 12-17
- p. 1490 1. 21-25
- p. 1525 1. 18-22
- p. 1554 1. 20-22
- p. 1791 1. 21
- p. 1877 1. 3-6
- p. 1877 1. 15-16
- p. 1900 1. 17-22
- p. 1925 1. 11-13
- p. 1926 1. 4-6
- p. 1926 1. 10-15
- p. 1953 1. 21-24
- p. 1954 1. 4-6
- p. 1955 1. 2-17
- p. 2013 1. 21-24
- p. 2085 1. 23-
- 2086 1. 3
- p. 2312 1. 18-19

*Page numbers not preceded by a letter refer to pages of the Lando deposition. In reference to the other depositions the following letters are used: W-Wallace, H-Hewitt, WL-Leonard, M-Manning, T-Todd.

*Affidavit in Support of Plaintiff's Motion to Compel
Discovery*

p. 2453 1. 5-10
 p. 2454 1. 8-11
 p. 2888 1. 18-23*
 p. 2889 1. 5-9
 p. 2889 1. 16-18
 p. 2890 1. 7-11
 p. 2890 1. 15-16
 p. 2890 1. 19-21
 p. 2891 1. 6-10
 p. 2891 1. 13-14
 p. 2892 1. 4-7
 p. 2892 1. 12-15
 p. 2892 1. 17-19
 p. 2892 1. 21-24
 H p. 151 1. 24-
 152 1. 3

2. Basis for conclusions which witness testified he reached

p. 668 1. 8-9
 p. 1530 1. 22-23
 p. 1748 1. 4
 p. 1892 1. 18-22

*This page reference and the ones following were not specifically set forth in the exchange of correspondence between plaintiff's counsel and counsel for Lando. However, all of these questions fall directly within item (6) of the O'Melveny letter of June 22, 1976 to Green [“questions concerning Lando's opinions and conclusions concerning the truth and accuracy of persons interviewed, appearing on or referred to in connection with the '60 Minutes' segment or the Atlantic Monthly article”]. That letter stated the items described therein as the subject of plaintiff's Rule 37 motion. As soon as counsel realized the omission of these specific pages, the information, on the morning of September 21, 1976, was telephoned to Lando's counsel.

*Affidavit in Support of Plaintiff's Motion to Compel
Discovery*

- 3. Basis for including certain statements and excluding contradictory statements
 - p. 876 1. 19-23
 - p. 878 1. 19-
 - 879 1. 2
- 4. Intention in including certain statements and excluding other statements
 - p. 525 1. 12-18
 - p. 668 1. 12-13
 - p. 668 1. 16-18
 - p. 1138 1. 18-21
 - p. 1139 1. 2-6
 - p. 1139 1. 10-15
 - p. 1790 1. 17-22
 - p. 1905 1. 11-
 - 1906 1. 8
 - p. 1907 1. 15-
 - 1908 1. 3
- 5. Conversations regarding the inclusion of certain statements and exclusion of other statements
 - p. 586 1. 15-19
 - p. 880 1. 5-7
 - p. 1754 1. 25-
 - 1755 1. 7
 - p. 1789 1. 24-
 - 1790 1. 2

Affidavit in Support of Plaintiff's Motion to Compel Discovery

6. General state of mind

p. 176 1. 3-6

B. Questions and Demands Concerning Activities and Occurrences after Publication (POINT TWO of memorandum)

p. 1331 1. 23

p. 1717 1. 6

p. 2303 1. 6-9

p. 2303 1. 13-15

p. 2556 1. 17-20

p. 2572 1. 4-7

p. 2573 1. 2-5

p. 2583 1. 18-21

p. 2685 1. 8-13

M p. 198 1. 11-13

M p. 203 1. 18-

204 1. 1

M p. 234 1. 21-24

M p. 236 1. 2-4, 7-8

T p. 117 1. 18-20, see

p. 118 1. 6-10

T p. 143 1. 16-

144 1. 9

Documents described under Item 17 of O'Melveny letter of June 22, 1976 to Richard G. Green

Documents described under Item 12 of O'Melveny letter of June 22, 1976 to Carleton G. Eldridge, Jr.

C. Questions and Demands Concerning a CBS Document Relating to Lando and Col. Franklin's Suit Against Herbert (POINT THREE of Memorandum)

p. 724 1. 24-25

p. 977-978

H p. 109 1. 18-24

Affidavit in Support of Plaintiff's Motion to Compel Discovery

Document described under Item 7 of O'Melveny letter of June 22, 1976 to Carleton G. Eldridge, Jr.

D. Questions and Demands Concerning Communications Between Atlantic Monthly and Conrad Oberdorfer (or other counsel) involving Lando's Manuscript and Article (POINT FOUR of Memorandum)

M p. 119 1. 22-24

See item 11 of Lubell letter of June 25, 1976 to Frank Curtis and Item 11 of Curtis letter of July 2, 1976 to Lubell

3. In addition to the above matters, there remains a dispute concerning (A) documents in the possession of CBS News, Wallace or Lando during the period from June 1, 1971, to February 4, 1973, (to May 1973 in regard to Lando) regarding Col. Herbert, the 173d Airborne Brigade while in Viet Nam, individuals appearing or referred to on the 60 Minutes segment and events described in Soldier and (B) documents relating to communications or correspondence with McCauley, Wooten, Holt Rinehart & Winston and employees of Atlantic Monthly concerning Herbert, his charges, and/or the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon. (See O'Melveny letter of June 22, 1976, to Green, Items 13 and 14 and Lubell letter of July 19, 1976, to Eldridge, Items 8 and 9). The area of dispute that remains concerns the production of documents that were in the possession of the parties indicated during the stated time period and concerning the described subjects but which were not specifically known to Wallace and Lando at the time the Program was being produced. Plaintiff believes that such documents are discoverable in that they are likely to lead to the discovery of admissible evidence relating to whether defendants published the charged libel in reckless disregard of its truth

Affidavit in Support of Plaintiff's Motion to Compel Discovery

or falsity. As noted in POINT ONE of the accompanying Memorandum, various matters are admissible as some evidence bearing on defendants' state of mind.

4. In connection with the communications between Atlantic Monthly and its attorneys I have attached hereto the letter of March 9, 1973, from Conrad Oberdorfer to Atlantic Monthly. Other exhibits and documents referred to in plaintiff's Memorandum will be submitted upon request of the Court.

5. In connection with the refusal of defendants to answer questions or produce documents after publication based upon a claim of "work product," the bringing of a suit against CBS and Atlantic Monthly became an expectable contingency on December 11, 1973. Prior to that date I had been representing Colonel Herbert in a libel suit brought against him, James Wooten and Holt Rinehart and Winston arising out of the book *Soldier*. Approximately two days prior to December 11, 1973, Herbert, myself and other counsel from my firm came to the conclusion that we could anticipate a legal suit being brought by Herbert against CBS and Atlantic Monthly. The first time this anticipation was communicated to an outside person was on December 11, 1973, at a conference with Timothy Dyk, Washington D. C. counsel for Holt, a subsidiary of CBS. I am not aware of any expectation by Herbert prior to approximately December 9, 1973, that a suit would be brought against CBS or Atlantic Monthly.

6. Plaintiff has excluded from his brief any discussion of defendant Wallace's claim of journalist's privilege, based upon a telephone call I received on September 17, 1976 from Wallace's attorney, Paul Jones, advising me that Wallace will not continue to attempt to assert that privilege.

Affidavit in Support of Plaintiff's Motion to Compel Discovery

7. For the reasons stated in the accompanying Memorandum of Law I respectfully request that this Court direct defendants to answer the questions to which they have objected and to produce the documents which they have refused to produce in the course of pre-trial discovery in this case.

JONATHAN W. LUBELL

Sworn to before me this
22nd day of September, 1976

MARY K. O'MELVENY

Notary Public, State of New York
No. 31-8219570
Qualified in New York County
Commission Expires March 30, 1978

*Affidavit in Support of Plaintiff's Motion to Compel
Discovery*

CHOATE, HALL & STEWART
 28 State Street
 Area Code 617
 Telephone 227-5020
 Cable Address Chohalste
 BOSTON, MASS. 02109

March 9, 1973

Mr. Robert Manning,
 Editor in Chief
 The Atlantic Monthly
 6 Arlington Street
 Boston, Massachusetts 02116

Re: THE SELLING OF COLONEL HERBERT
 by Barry Lando

Dear Bob:

This will supplement my telephone message earlier this week to the effect that I saw no legal objection in principle to your going ahead with the Lando article, but that I had some possible reservations which I would specify later. Here they are, and they are very few.

It may be advisable to remove the gratuitous reference to Arnheiter in connection with "liar" in line 6 on page 16 even though this only purports to quote Wallace.

If you want to be abundantly cautious, you might use something such as "invention" or "fiction" in a few places instead of "liar," and similarly for the verb. E. g., last line on page 16 and fourth on page 17. On page 18, line 9, and page 33, line 12, "liar" appears to have been already deleted. The same seems to be true of the reference to a "skunk" on page 14, line 15.

*Affidavit in Support of Plaintiff's Motion to Compel
Discovery*

As an editorial comment, "1962" in line 8 on page 23 is obviously an error.

I understand that between the public interest aspects of the article (exposure to liability) and the generous publicity L'affaire Herbert has already received (making it hard to see what substantial additional damages would (*could*) be found (*minimizing*) in his favor), the risk of a successful libel suit by Herbert (or anyone else) is very small. Apropos publicity, you may add the enclosed review of the book and an interview with Herbert, from National Review and B.A.D., respectively, and these from rather opposite quarters, to your files, if you have not already seen them.

The B.A.D. piece quotes Herbert, quoting in turn the following as a "most important" statement allegedly made by Lando in the presence of three witnesses: "I'll get you, Herbert." If the Lando article were to contain serious untruths and if Lando's threat could be proved, Herbert might have a considerably easier case. While I am not making either of these assumptions, I recommend nonetheless that you query Lando regarding his alleged statement and keep a memorandum of his denial or explanation of what he meant. If he were to admit to anything even suggesting "malice" against Herbert in the sense of willingness to ruin or damage Herbert's reputation regardless of the facts—certainly not something that is likely or apparent from the tenor of this article as a whole—you would of course have serious second thoughts, even without my advice regarding the effect this might have if Herbert ever did bring a suit. In connection with the Lando threat, however, I note in passing that according to Lando (page 45, end of first paragraph) Herbert also accused the Army of having in effect determined to "get this guy" (Herbert).

Sincerely yours,

CONRAD W. OBERDORFER

Enclosures

CWO:dbw

Opinions and Orders of Courts Below—Printed in Appendix to the Petition for Writ of Certiorari

Printed in the Appendix to the Petition for Writ of Certiorari at the Pages Designated

Memorandum and Order per Judge Haight dated
January 4, 1977 Concerning Plaintiff's Re-
quests for Additional Discovery 53a-89a

Memorandum Opinion and Order per Judge
Haight dated February 22, 1977 Certify-
ing the Court's Prior Memorandum and
Order dated January 4, 1977 90a-98a

Opinion of the Court of Appeals Dated Novem-
ber 7, 1977 1a-52a